

*OTHER BOOKS BY FREDERIC JESUP STIMSON*

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THE AMERICAN CONSTITUTION

POPULAR LAW-MAKING

A HANDBOOK TO THE LABOR LAW OF  
THE UNITED STATES

LABOR IN ITS RELATIONS TO LAW

## THE WESTERN WAY





# THE WESTERN WAY

The Accomplishment and Future of Modern  
Democracy

BY  
FREDERIC JESUP STIMSON

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## PART ONE

*A bibliography of books cited will be found at the end; but as this book is not a law-book, but intended for popular reading, the author has not burdened it with references to laws or court decisions, which would have run to many hundred thousands.*

## CHAPTER I

### A PREFACE AND]AN EXPLANATION—DEMOCRACY'S NEW POWER—FIRST AIMS

#### I. A PREFACE AND AN EXPLANATION

In the latter years of the last century the author published, under the title of "The Ethics of Democracy," five or six essays in the direction of this attempted work. The first attracted the attention of the late Viscount Bryce and was noticed in the earliest edition of his *American Commonwealth*, while others met with European comment and were extensively translated, notably into German; but the writer after a few years gave over pursuing the work, deeming it too vast, and his acquaintance with the subject too limited, hoping perhaps that the work might come to be done by others more competent.

But the qualitative analysis of democratic government has not yet been attempted. Its prophet, de Tocqueville, has been followed by no bard for its history. Siegfried is perhaps the best of recent writers on our own; but the views of all foreign observers upon American democracy are imperfect and, necessarily, superficial. Bryce, in his last study,\* covered indeed a broader field, but remained descriptive merely of *form* of government and of its administration; he recounts the form and functioning of democracy in all modern republics, but makes no attempt at their sociology, their civilization as affected by the institution of democracy, the present quality and aims of their governments. To the writer, in November, 1920, when finally reviewing his proofs, he said that "this subject was too vast." But it is to his encour-

\**Modern Democracies*, 1921.



agement, then given, that his disciple owes the courage to begin once more; though the difficulty of the theme has not decreased with time, nor does the author feel his competence to deal with it much increased by the forty years of study he has given to the matter. He can only claim that his thoughts, such as they are, are ripe. The obvious extension of that phrase he leaves to his critics.

Thus not one of the essays\* above referred to could be incorporated, even with extensive alteration, in the body of this book, so rapid are the changes, be they of stream or eddy, in the current of democracy. Yet, in essentials, they appear surprisingly unaltered. Perhaps the course of the stream, certainly of the eddies, has not been what the prophets hoped nor as we might prefer. The more then is the need for our study of it; that we may have wisdom to execute the proper works, lest some evil eddies do indeed become the stream. But we must not be over-confident that they are only eddies; for democracy, self-conscious democracy, has been a very recent thing in the world's history. The ancient democracies of Athens or Rome were so subject in their law to religion or tradition that they afford no lesson of what a nation-wide democracy may do when consciously clothed with the law-making as well as executing power. The most ancient law was that of the family; then came that of the tribe, or the little city, the family law still surviving as a state religion; never yet came law of a free people untrammelled by class or aristocracy, religion, tradition or taboo; and only in the later and decadent Roman empire ever venturing to enact new laws (decrees or statutes) at all. Law was at first a divine thing, revealed or ordered by the God of one's fathers. The unusual thing about modern democracies is that they make new law.

\* See *Scribner's Magazine*, June, 1887; June, 1894; *Atlantic Monthly*, Nov., 1897; *Journal of Social Science*, December, 1897, "Democracy and the Laboring Man"; *Yale Review*, 1897; *Ethik der Volksherrschaft in America*, Berlin, 1887.

And there were no free democracies in our modern sense before the Northerners came down to mingle with the Mediterraneans; to-day the great difference between the Latin and the Saxon mind is that the former thinks of law, order, the latter of his own liberty. In ancient times, in the Mediterranean world, no man was ever free; nor did he think he was, according to our idea of freedom. Thus of the three theories or varieties of law, the three sources, origins, motives of control which our most recent\* monograph distinguishes, the religious, analytical, or philosophical,—the Greeks and early Romans had only the former; the Semitic law was tribal, theocratic; and the oriental apparently always autocratic. And the city, the earliest democracy, was founded on a family law, which in turn was based, like our New England theocracy, on religion. But in the one case, just as in the other, no personal liberty subsisted. All was law; the citizen was submitted in all things and with no reserves to the (City) state, belonged to it; the religion which had given birth to the state, and the state which maintained the religion, were as one, each the support of the other, together forming a power almost surhuman, to which were bound one's body and one's soul. There was nothing in man which was independent. His body belonged to the state, his fortune was at its disposition.† Nor did his private life escape the state's omnipotence; he could not remain unmarried in Athens, or marry late in Sparta; he could not be idle in Sparta, while independent labor was forbidden in Athens; in Locri men were forbidden to drink wine, in Rome and Marseilles, women; in Athens a lady travelling was permitted to carry but three dresses, in Byzance a man was forbidden to shave; while the state had power in all to compel a man to put to death his defective child. A man had to take

\*Roscoe Pound, *Law and Morals*, 1924.

†Fustel de Coulanges, *La Cité Antique*, p.<sup>s</sup> 262 et seq.

sides in politics, vote with one or the other party, or he was exiled. . . . Education was far from being free; there was nothing in which the state was a more insistent master; the father was deprived of all control over his child's schooling; "they belong, not to him, but to the city," said Plato. . . . "The state might forbid private schools."\* And finally, a man had of course no right of free religion; he must worship the City's Gods or, like Socrates, drink the hemlock. In short (Fustel de Coulanges concludes) it is an error, singular among all human errors, to have believed that in these ancient cities men enjoyed liberty. "*Il n'en avait pas même l'idée.*" He did not dream that there could exist for him a right as against the City and its Gods. "We shall see that the government itself has often changed form, but the nature of the state has kept the same, its omnipotence has not lessened; call it monarchy, aristocracy, democracy, it has never given to men true liberty, the liberty of the individual. . . . To have political rights, to vote, to be chosen magistrate—this is what one has called liberty; but no man has any the less been in service to the 'State.' "

Much harm would be avoided and error averted if for all time men in lieu of saying "State" would say "the man (or men) in power, or office." They did so when there was a king—hence King, Emperor, or Pope is far less dangerous, either in phrase or fact. *State* is one of those words which mislead men's thoughts.† Man's sense or conscience easily shakes off a Czar; but he conforms to the "State" as if it were something sacrosanct because of his own creation. The state has come to bulk in the popular imagination—not only the German, but the American as well—as something more and higher than the men who make it up; something super-

\*The reader will remember the recent decision of the Federal Supreme Court forbidding the State of Oregon to do so.

†Clemenceau in his *Le Soir de la Pensée* complains frequently of such words; but mostly in theology or metaphysics.

human, or, reverting to that ancient concept, divine. Were it God, there might indeed, among the other consequences, be liberty—for His service is perfect freedom, says a Christian prayer. But, were there actual Christianity, there were no need of studies such as this. The state in any form would then make men free—were there King or Congress—though Anarchy, as the simplest, freest form, would be the best. A curious word dropped from the lips of Fisher Ames, orator of the Jay treaty and right-hand-man to President Washington, just before he died: “I fear this country is too extensive to be united, and *too democratic to be free.*” Extraordinary paradox these words would seem to leaders like Bryan with his slogan—“the cure for democracy is more democracy.” And even Bryce (as did all liberal leaders in the last two centuries) through all his earlier work assumes, but with a shade of doubt in the last, that democracy is an end in itself. As in 1789 they spoke, so still they write, of revolution, of liberation by law, of the adoption of Constitutions, of the broadening of the electorate, of the proclamation of the Republic, of a legislature popularly elected, of universal suffrage, by men and women, of direct legislation, of direct nomination for office—the ancient Greeks two thousand years ago went a step further and chose them by lot—and finally of the control of the courts and abrogation of any constitutional restraint—as in 1789 with the French republic, so now, with this ultimate democracy; that when it is reached, nothing more will remain to be done for the good of humanity. The imperfections, the abuses, the faults, will be due only to the fact that the countries displaying them are not true democracies—as in Central American republics, or Italy, Portugal, or Soviet Russia.

Still less does it occur to them to think what democracy, when it is fully attained,—perfect, flawless, classless, priestless, sexless,—will do with itself. There are as yet no writ-

ings upon this subject. The reviews or compendiums of present legislation, such as the bulky volumes on the laws of the British Empire; the work of the U. S. Industrial Commission; the annual summaries of the American Bar Association, best of all, in its limited field; the annual compendiums of the Belgian *Bureau de Travail*, of the labor legislation in all Aryan countries (one was about to say, *civilized*, but 1914 gives pause; and *European* or *occidental* will not do, for they include North America, Australasia, Argentina, and Uruguay) now unhappily suspended since the War; are all, and after all, but the materials for such study. And they are often limited to a few subjects, notably the industrial field (labor, trusts, etc.) or, for practical purposes, the commercial. Then finally, legislation is but part of governmental functioning, and not a necessary part at that, for it is quite possible to conceive of society without legislation; indeed such a state successfully existed, for the first thousand years or so, in England. Nevertheless, as modern democracy—outside of Russia—proceeds first to its work rather in the legislative function than in the administrative, still less the judicial, it is here that we may study most easily the first great field of democracy's reactions.

That is why our first explorations must be of the law-making output, as were the half dozen essays above alluded to. Field enough will be found there, before we venture into further territory.

Now the administrative side of human society has been always treated of, in many books, from Plato or Aristotle down; such are all books on the science of government, on constitutional theory or law. But of qualitative, not quantitative or structural, analysis of democracy—output and result, not form or function—the *content*, not the form,—the *results* of a constitution, not its scheme of government—of these there is as yet neither science nor systematic study;

although plenty of impassioned prediction, passionate denial, and cynical doubt.

The assumption that the overthrow of kings brought democracy, and that democracy brought good government, and with its perfection nothing remained to be done and all would be forever well, has only been held as a world doctrine ("*world*" in the sense that our grandfathers called *civilized*) even of advanced thinkers, for some hundred and seventy years. Even then we must leave out Germany, in which the democratic dogma has never obtained serious following. It of course found its chief exponent in the French revolution (ours was not a democratic, but a political, revolution) which being social, functional, was revolution in the real sense that radicals use the word. It found its echo in our more hotheaded leaders (one must not say, patriotic, for John Adams, hotheaded as Paine or Patrick Henry, was a conservative in all essential things and had even some leanings to a monarchy). Yet Adams finally concludes (Jan. 8, 1776):

"It is the Form of Government which gives the decisive Colour to the Manners of the People, more than any other Thing. Under a well regulated Commonwealth, the People must be wise, virtuous and cannot be otherwise. Under a Monarchy they may be as vicious and foolish as they please . . ."

Surely no one ever made larger claims for Democracy! Yet still,

"Virtue and Simplicity of Manners are indispensably necessary in a Republic among all orders and Degrees of Men."\*

While Fisher Ames, writing twenty years later, after some experience of democratic government, still expressed the doubt whether it and liberty were compatible! But these voices were drowned in the political successes of the Revo-

\*John Adams to Mercy Warren, in *Warren-Adams Letters*, I, p. 202.

lution and the rapid material growth of the nation. While many had hesitated about taking the step, few remained to question it when taken. It was too late for abstract principles, and too soon by a century to study concrete results. De Tocqueville is the only one to throw light upon the subject in the large, even he only in occasional passages; while Bryce in his *American Commonwealth* rarely gives a qualitative analysis. And our "hundred per-cent" Americans are all agreed that we are the best of all democracies and democracy the best of all possible worlds.

It were futile to deny this last; impossible, if the emphasis be placed on the word "possible" employed above. Nevertheless, democracy needs guidance. Its very etymology so states. It is not a power not ourselves working *ex proprio motu* for good. Is its guidance to be the spoilsman—the fanatic—the demagogue—or even only the "man in the street"! Or is it to be the instructed intelligence of leaders who shall guide the man in the street? "Informed public opinion," say our latest authorities. Be it so. To inform public opinion, we must first of all study public acts.

## 2. DEMOCRACY'S NEW POWER

The most public act of the people ruling is—what most States now officially call them—"the Public Acts" of the legislature. And this is the first conscious and constructive exercise of power by a democracy which is conscious of its power. After it has dethroned its king, replaced the old regime by its own officials, it turns to making over the law. The primal Act is that of the constituent assembly; but this may be dispensed with, for a democracy may function, as now in Russia, without a constitution, assuming the law-making power directly and without any restraint.

Statutes, therefore, are the first material for our study

ready to our hand. For the modern arrived democracy, either by revolution or evolution, when it heads the government, controls the army, and fills the executive or administrative branch, turns its next attention to the legislative. And in all countries, even in ours, this notion that it has power to make the law becomes heady and intoxicating.

It is necessary at the outset to realize how very modern this notion is. Leaving out laws defining the frame of government and its administration, or laws affixing penalties to already recognized crimes; what we may call *substantive* law—the law as between man and man—still later, the law as between man and the state,—was rarely legislated or even legislated *upon* in ancient times in that Teutonic civilization which must henceforth be the principal object of our study. And even among the Greeks when the people (never a legislature) so legislated, we all remember how Gibbon tells us that the proposer of such new law did so with a rope around his neck. And if later, in Rome, edicts or “tables” became usual, in so far as they touched substantive matters they pretended but to conform or codify the ancient law of the city, which in its origin was the custom of the family. Yet Latin civilization is that of Law—while Teutonic—which, for want of a better term and other reasons we will now simply call *Saxon*—is that of Liberty. The individual was anciently controlled only by the custom of his tribe.

Yet custom is the best enforced of all laws—as may be seen in any club or college—but it was not for this reason that the ancient custom of our English people could not be changed by edict or decree; there seemed to them something sacrilegious about change; already moreover they put liberty as the primal principle, above control by Church or king. The early constitutional history of England is one long fight for the ancient customs of the Saxons—“the law as it was in King Edward’s time”—against Norman edict or Roman



code or canon. And the first time that a statute in the modern sense was proposed—a most worthy statute too, that to legitimate the children of parents married since their birth—“the barons with one accord cried, we do not want to change the laws of England.”\* But these “*laws*” were not then *statutes*.

Nevertheless of the two civilizations our Western world has known, in what we used to call recorded history, the earlier, the Mediterranean, developed under emperor’s or army rule, and Justinian’s code into that of a law written out and imposed from above—of which the nearest exponent in modern Europe, leaving out Turkey, was Prussia—while the later, Teutonic, Nordic, developed on the lines of individual liberty, only controlled substantively (i. e., in *human* matters, not the functioning of government) by long established and thus justified custom, never imposed by government except in those things which were Cæsar’s—taxes and military service. Hence our catch-phrase—that Latin civilization is based on Law, Saxon on Liberty. But when modern revolutions came on, familiarized with the idea of ruler-made law by both Rome and Constantinople, democracies naturally took over the instrument as a tool ready to their hands.

Few of us realize how modern is the idea of constructive, substantial legislation (other than mere governmental regulation, support, defense, taxation) “struck off” (to use Gladstone’s fallacious phrase about our Constitution) at a definite time, not “by the hand of Man” but by some particular body of men. The early English statutes, even after the

\*One of the greatest difficulties a lecturer to the French on English law would have is the contradiction in terminology arising from these two distinctive systems. For the French “*la loi*” is a statute, to the English it was never that. True that the practice of over-legislation and the fondness for codifying has led most people to forget this, and, as legislative acts are called laws, we have to prefix the word *common* when we intend the older meaning. But in French “*la loi commune*” is no adequate translation of our *common law*.

Conquest, never pretend to *make* law, only to have it recognized by the king; hence the word itself, *statute*, is not used before the fifteenth century; before that it was "*charter*," "*constitution*," or "*assize*." Leaving out the matter of fines or punishments, to which only the early Saxon laws are confined, but which are not in a true sense laws, but rather tariffs, or sanctions for a law previously existing, they never "change the laws of England." They were always drawn up in the form of a petition to the king, that he recognize a previously existing law of England, or free custom of some city. If you had asked an Englishman of the first five centuries following the Conquest if the king could make a law, new, he would have said, surely not; asked whether Parliament could, he would have hesitated to answer and probably said that anyhow they wouldn't. So, even down to the Commonwealth, there are few statutes of constructive legislation. But the Long Parliament, heady with conscious power, enacted a mass of such, all promptly annulled at the Restoration.

But the French democracy, after a far more radical revolution than the English, which was merely dynastic, or than ours, which was political, and did not alter, nay, was based on and confirmed our ancient law; after a revolution social as well as governmental, produced a legislative body fully conscious of its power, whose work was swept away by the Code Napoléon.

Ready-made law, law made by statute, is therefore with Anglo-Saxons a modern process. Customary law is always fitting to its people; a statutory law always risks a misfit. The one has been tried on, is used to the body politic; the other is always an experiment. The one may be likened to the curative, protective processes of nature; the other to a surgical operation. It may be necessary; it may improve the common weal or wealth; but there is always a risk. And like

surgery it has had its greatest development in recent years. It is by far the most distinctive phenomenon of American democracy. And its power is vast; so vast as to intoxicate its self-conscious possessors. Early English times (I speak always of what I call constructive statutes, not declaratory) did not find legislation necessary. For example, remember that even up to now there is no *statute*, English or American, forbidding murder. And so of all the other things: scales of penalties, rates for services, were enacted by statute, defenses or excuses outlined; but the substantive law that murder or theft was forbidden needed no statute to say so; it was known of the people without. So in civil matters: in view of the present fashionable leaning toward communism, it is significant that the earliest English constructive statute (not called a statute, but the Charter of Liberties) is that of 1109, recognizing personal property as inheritable. Thus we see that personal property required no recognition by the written law. And as early as King Ine's law of A. D. 690 the punishment of a thief was prescribed; and there can be no stealing without recognized property. And the next constructive Act, called an Assize (1266), fixes the price of bread and beer. These early Statutes of the Realm show their solicitude for the customary law on every page; ending with restrictions upon the crown, they begin as early as 1164 in a statute called the "Constitutions of Clarendon" by subjecting to the common law the Church and the priests. So in the first great "Statute"—Westminster I.—excessive tolls are forbidden, but only when "contrary to the common custom of the realm."

So we see that in the matter of lawmaking our American democracy is the first in history which found a world ready for it to work its will upon. Mankind, from the dawn of history until almost within the memory of living man, had been busied in his political activity with but three things—con-

quest, religion, and freedom. Until a period which may roughly be indicated as lying between the English, the American, and the French Revolutions, all men's energies had been taken up, either with freeing themselves from the tyranny of others or with imposing their own rule or religion upon other peoples. There always had been a King to be dethroned, a yoke to be thrown off, a creed to be evaded, or, at least and last, a tax to be escaped. Man had to struggle first to protect his life; then to get a living; then to protect his property; and always that he might think and say what he chose. The history of the people had hitherto been in what we might call its destructive, or at least, defensive, stage; it had been necessary rather to avert evil than to seek after good.

But with the coming of our democracy all these things have changed. And we have now at least one country where, for over a century, there has been neither king nor oligarchy nor oppressive taxation by a central power nor established religion nor desire for foreign conquest nor alien enemies nor armed propaganda. For four generations, up to the world war, our people's hands have been untied; they have laid aside the sword; even the plough (such has been their prosperity) has not been grasped in all their working hours. They have had leisure for play, leisure for thought. Their hands have been free, their minds at rest; they have had both the sceptre of power and the leisure to employ it. For the first considerable time in the history of the world, they have had their wishes and have worked their will;—what have they done with it so far? And how far does such action suggest the future? We have had our say, we so-called masses—what have we said—and done?

In the old fairy-tale the poor man and his wife were given their three wishes. And the wife wished for a black pudding; and the husband wished it at the end of his wife's

nose. And there was nothing left for the third but to wish it off again. We may say that our own democracy has been more wise than this. But there has been shown a tendency rather to wish for puddings than for hands free to get them, and stomachs able to digest them. We have seen rash measures and rash laws, directed to immediate or selfish ends, all previous human experience disregarded.

The explanation is to be found in what we have already said. For three thousand years humanity had thought that its woes all came from others, from tyrants or aristocrats, from enemies or false religions; itself was capable, within itself, of perfect blessedness. Suddenly these other evil things had been eliminated from our sociology; what, then, was left, but happiness and perfect light? And democracy, grasping like Phaethon the reins of power, drove straightway for the sun.

If *inter arma silent leges*, we may put the converse,—*tacent arma, loquuntur leges*; and the first obvious extent of the people's rule has been enormous and audacious extension of the quantity and the scope of the written law. The statutes passed since the Revolution in our country have been more important, more varied in scope, and more radical in social effect than all the laws of England—if we leave out the *habeas corpus* Act—from Magna Carta to Victoria. For older laws were meant mainly to check the oppression of the few; ours, and the English since Victoria, rather at constructing the happiness, or at least the material well-being, of the many. Democracy hastened to conclude that, since all ill came from power, and power had been enforced through laws, the people, having at last the power, by laws could accomplish all good.

Now statutes, however contemptuously the older courts regarded them ("You know only the Code?" said the Judge examiner to the aspirant for the Massachusetts bar—"then

the legislature may any day repeal all that you know") are after all the only utterance of the people's will. For they are the direct speech of "He who must be obeyed."

Two great eras may be marked, in our country, in the voicing of democracy by law. At first, as was natural, the people, so lately escaped from royal oppression or foreign menace, sought to bind and clinch the matter by a multitude of protective and prohibitive provisions directed against its older enemies; a series of chains which fortunately have proved as unnecessary as Bunyan, somewhat prematurely, thought the gyves on Pope and Pagan.\* Of this nature is the careful iteration, in all our State constitutions, that men are free and equal, are possessed of inalienable rights of life and liberty, and (in all the States except Missouri, in which gloomy Commonwealth they have not, it appears, such right) to the pursuit of happiness; and they are not to have exclusive or hereditary privileges for any one, nor, standing armies, nor martial law, nor feudal tenures, nor be burdened with established churches or compelled to attend such, nor to make sectarian appropriations, nor be submitted to religious oaths or tests. Of this now fully recognized nature is the constitutional clause that men shall have freedom of speech, liberty of the press, shot-guns *ad libitum*, the right to assemble and consult and to petition the government, the right to emigrate or renounce citizenship, to sue at law, to claim *habeas corpus*, to have jury trial, and no imprisonment for debt, and bail, and warrants for arrest, and no general warrants, so that a man's house may be his castle—"the thatch may fall, and the wind may enter, but the King cannot"—and his person free from search; no trial for crime without indictment of a grand jury, and no civil suit or rule by administrative officer without the common law; freedom

\*I am now quoting from the first article of *Ethics of Democracy*, which was written in 1887. To-day the Ku Klux Klan or the anti-Mongolian might think me as premature in deeming these chains unnecessary as was John Bunyan.

from attainder, cruel punishments, *ex post facto* laws; the right to the sanctity of his home, and to bring up his children and employ his time in his own way. Of such nature, finally is the sweeping constitutional provision, in Virginia's, the earliest and the pattern American constitution, and in nine other States', that these fundamental rights shall forever be saved and excepted out of the powers of any and all governments, even though amended into the Constitution and voted by the people's representatives. This last clincher is a padlock from the arsenal of Jean Jacques Rousseau; as is also the statement, nearly universal in our State constitutions, that all political power is inherent in the people, who have at all times the right to make or overthrow government, whose very existence is founded upon their contract.

All these were evidently framed in view of what we have called the destructive, defensive era of the people's assertion of itself; the time when it was necessary for them rather to prohibit or prevent\* than to provide, direct, foster.

And among these "inalienable" rights we do find, in nearly thirty State constitutions, the right to acquire and possess property.† It may be speculated whether this would be passed so unanimously to-day—that by their very compact of gov-

\*And now it may be so still again. Our people are losing their understanding of the Constitution as the safeguard of private rights.

†I have purposely here kept to the text written in 1887. Since that time, when, besides the Federal Constitution and the sweeping declaration of the sanctity of property in the Virginia and the Massachusetts Bill of Rights there were "nearly thirty" State constitutions expressly protecting it, Oklahoma in its constitution has limited man's right to property to the fruits of his own labor (as did North Carolina in 1896, following Missouri in 1875); but Maine and New Hampshire, New York, Delaware and Ohio, South Carolina, Virginia, Florida, Louisiana, Kentucky and Mississippi, Alabama, Michigan, the Dakotas, Idaho, Montana, Washington, Wyoming, Utah and New Mexico have all adopted constitutions retaining the broad and general guaranty, either as an abstract right or under the due process of law clause. The tendency of American democracy therefore on this crucial question—to which, as the second condition of historical civilization, we must later devote an entire chapter—both in the North and in the South, in the radical West and in the conservative East, has proved more conservative than my forecast of forty years ago. And it is doubtful if the woman vote will alter us in this particular.

ernment a single dissentient citizen may rebel, in many States expressly authorized by the constitution in so doing, if his absolute right of property is not protected. Of course, he may, in all States, invoke the Supreme court to protect it.

These were the four great natural rights as defined by our democracy—life, liberty, property, and the pursuit of happiness—in which latter vague term, we may probably include the right to labor and trade and the general exercise of all one's faculties. Three States thought it necessary to add the right to one's personal reputation—a principle not without interest in these days of advertising and personal journalism; and the radical State of North Dakota followed. Religion, though considered a primal right, was given a separate clause. These things were declared sacrosanct by democracy at its start; not only here but in France, where also democracy drew its own charter *de novo*.

But soon the reflux wave, the era of construction and experiment, appeared. It gradually became evident even to the most radical democrats that tyrants in coat-of-mail were no longer to be expected, that the feudal system had really ceased to be the structure of the state, that there was no likelihood of the establishment of a Church inquisition in Boston or New York. Some earnest souls were loath to believe that the conflict was over, then as now, and followed the defeated enemy in scattered squads, shrieking more loudly against the abuse when the abuse had vanished. By these the last vestiges and savor of the old order of things were valiantly removed, such as the few remaining property qualifications on the right of suffrage, even in most States the educational ones, long tenures of office, appointive judges, estates tail, honors and decorations, imprisonment for debt. Titles and hereditary privileges were eschewed by our grandfathers with a zeal only equalled by their granddaughters in espousing them. The principles of rotation in



office, elective judges, no monopolies or exclusive or indefinite charters were established. The people had not yet learned that what they had to fear was not the power of money inherited, but money used; not of social rings, but of political; corporations or trusts, not monasteries; plutocracy, not aristocracy; guilds, not churches.

But soon after these overzealous and perhaps unnecessary efforts to cut off the last outposts of the beaten enemy, early in the last century, there appeared the beginning of the great constructive movement; the first effort of the people at large to mould society to its ideal perfection; as Matthew Arnold said, the assertion by democracy of its essence, laying the cornerstones of the people's new republic. Here therefore, in America, should be our first study. For the European countries were still far behind. France had lapsed from democracy; in England it was only beginning to be self-conscious. And now for nearly a century and a half, since the first State constitutions were adopted, in forty-eight different laboratories our legislatures have sought to synthesize democracy. And despite the cry of the Bolshevik that this too has failed, and should be wiped out like a child's drawing on a slate, we cannot feel that it has wholly failed. And the sponge that is to wipe it out—as Washington said about our drawing of the Federal Constitution—may be bathed in blood.

### 3. FIRST AIMS

When our democracy, freed and fearless, looked about itself and saw its sceptre lying ready; when the *demos* first became a *demiurg*; when that first moment of fruition had passed and the last echo of the pæans that greeted it had died away—it considered itself, and it found that still it was not happy. And it thought what might be the cause of this; and it saw, or thought it saw, several reasons. One man said, it

is money; another, woman's case; a third, the slaves; others, better philosophers, said it is man's own weakness—and particularly that variety of weakness which finds its most definite expression in a desire rather to gloss things over with strong drink than to tackle them with the primal curse of labor.

Accordingly we find the first organized voice of the people directed, in constructive legislation, to the softening of money troubles, the mitigation of domestic unhappiness, and the attempt to enact a prevalent weakness out of existence by a statute, as a drunkard "swears off" on the 1st of January. This effort, in the States in the middle of the century, proved nugatory, and the burden of repressing this personal failing has been placed by constitutional amendment on the central government; but the local efforts show at least how quick was democracy to grasp the truth that man's woes come rather from himself than from any natural law or force outside—a truth that now seems in danger of slipping from our minds.

It cannot be said that any one of these three efforts has either yet been pushed to its logical end, or has been abandoned; though women suffrage has carried us farther on the road than we have progressed on the other two. Each is to be discussed, with other matters, in later chapters: but it may be interesting to quote literally our general conclusions from our 1887 essay:

"Hitherto democracy has deemed the intoxication-habit a more dangerous vice than commercial dishonesty or loose sexual relations. . . .

"While still recognizing marriage as a civil status, it has tended to deny the husband that right of authority and control of children which had hitherto been the axiom of the Anglo-Saxon, still more the French, view of the institution; and to make of marriage a contract easily made and easily

ended, while strictly punishing offenses against the relation while it lasts ;

"The tendency of democracy is neither to impose, to recognize, nor to authorize any legal, social, or political difference between the sexes";

Nor "to force juridically a man to pay his debts against his will"; but "to greatly increase local and of late Federal taxation, now amounting in the aggregate to from a quarter to half the net income of a man's property."

And finally, "Democracy, when crowned with legislative power, seeks rather what it considers the welfare of the community than the liberty of the individual." And my study then concluded:

"The ethics of democracy are utilitarian, even opportunist; no commandment, no tradition, no inheritance, no social prejudice, is beyond the test of daily use. Murder may be rarely prosecuted, prevented, or punished, while beer-drinking is made a crime; organized theft, the great trusts or combinations flourish unchallenged,\* commercial honesty in general be little considered, business debts be rendered unenforceable by exemption and insolvency laws, marriage be made the brittlest of legal relations—while the statutes and city ordinances create a thousand petty things misdemeanors or even crimes—and another year all these things be changed. On the one hand it may tend to make the "State" omnipotent in all spheres of human action; on the other its statutes may fall into disuse and be transgressed with impunity. Democracy is audacious, for it attempts too much; it is radical, for it has no memory of the past. It acts by impulse, like a weak mother. Yet, its young arms bear the future of the world. That is why the study of its tendencies as

\*Written in 1887. Before this the writer had contributed to the *Harvard Law Review* (Vol. I, p. 132) an article entitled "Trusts." In 1889 Kansas, Michigan, and Nebraska passed laws against them, before the Federal (Sherman) Act of 1890.

well as its achievements becomes all-important; for its dreams to-day are laws to-morrow. *Dove si puote ciò che si vuole*—the realm where that can be, which is willed.

But through all our investigation we may note a pregnant coincidence. "State action, interference as regulator of labor or trade, divider of profits and of wages, censor, nurse, guardian, prohibitor of drink, prescriber of education, controller even of marriage; women's rights, easy divorce; state guardianship of children; socialistic measures, bureaucracy, ever-increasing state control—all these, though by no means supported by the same classes, or even classes largely coincident, have had a curious interconnection. If they have not stood and fallen side by side, they have certainly advanced and receded at the same time. What is the reason of this? Doubtless it has not been an intended coincidence. Most women who want women's economic liberty, equal wages, the right to vote,\* by no means want free love; loose construers of the Constitution do not mean socialism; labor reformers do not, in other matters, like state-control, even in their own disputes; prohibitionists"—it depends what the prohibitionists are of! "Yet, with or without reason, they seem to go together—as magnetic storms wax and wane with spots on the sun. Therefore, without prejudice against any one proposed reform, it is impossible not to end, if not with the deduction, at least with the suggestion—that, for some reason which we will not now attempt to fathom, *the three institutions, of private property, of marriage, and of personal liberty from state control, are so inseparably bound together that neither one may fall without the other two.*"†

\*The article quoted was written in 1887.

†This deduction was based on the author's reading, for the preparation of his *American Statute Law*, of the statutes of all the States and Territories, as they then existed; and later, as advisory counsel to the United States Industrial Commission, of the entire legislation of the British Empire, Belgium, Germany, France, Italy and Austria. But for a late instance I quote from a speech in the Senate, of Senator Overman of North Carolina, delivered May 26, 1928, against

the bill proposed in Congress to amend the Constitution so as to give the Federal government power over divorce (and marriage), removing most restrictions, such as miscegenation, upon marriage, all State control of divorce, greatly increasing the number of causes—the Capper bill, so-called

“The vice-president of the General Federation of Women’s Clubs struck the keynote for the proponents of the measure.” And as I write (Feb. 2, 1929) State Senator Loring Young of Massachusetts is appealing against it before the Senate Judiciary Committee, arguing that “it is a very dangerous experiment. In Massachusetts it would wipe out a number of laws which the Legislature has enacted for the protection of women—in industry, in property rights, in domestic relations and in the criminal law. On the industrial side, the 48-hour law, the minimum wage law, and the statute prohibiting employment of women after 10 o’clock at night would be automatically repealed. On the score of domestic relations, the amendment would wipe out such laws as those affecting non-support and abandonment.”<sup>2</sup>

## CHAPTER II

### LIBERTY—PROGRESS OF SOCIALISM—STATE INTERFERENCE— COMPARISONS OF TIMES AND COUNTRIES

#### I. LIBERTY

The one *avowed* aim of democratic movements of modern time has been "liberty." Only the first French revolution added equality. I put it in quotation marks; because here we are met by a liminal question. By liberty, did they mean liberty of the people or liberty of the individual?

The definition of liberty in the abstract is not so difficult. It can mean nothing but absence of control. But absence of control of the people is anarchy; of the individual, lawlessness. It is doubtful if even the word that was glib on the lips of the French revolutionists in 1789 and probably also in 1793 meant this to them. They were not scientific anarchists. They aimed at concrete measures. They complained of autocracy—which to them meant royalty or feudal oppression—of denial of equality before the law, of oppressive taxation. Consciously or unconsciously, and with some memory of past local independence of a central government, they based their new ideas on the history of the neighboring English people. But the English people never thought abstractly. Wholly unconscious of creating a novel political theory, hardly conscious of the Teutonic tradition of personal liberty, although inbred in them, they saw each moment but the thing of the moment. As the Germans of to-day are so fond of taunting, an Englishman is without general ideas. More rudely, he never thinks in theory, or even apperceives a fact until it hits him on the nose. He has no imagination of the future; and (according to the French to-day) no memory of

the past. The very word *liberty* in English constitutional documents is never used abstractly, as we were first to use it in the second paragraph of the Declaration of Independence and in the very preamble of the Constitution. It is always in connection with a definite thing, or place—liberty of trade, or printing, liberties of the city of London. True, the Magna Carta of Henry III (1217) has the very significant addition (omitted in later confirmations of John's Charter) "his freehold, or his liberties, or his free customs" after the sentence "No free man shall be taken, or imprisoned, or disseised." But the sentence itself indicates that these liberties are definite, not abstract. We have to wait 424 years for the next English constitutional document which treats of liberty abstractly; and that is in that pronouncement of the Massachusetts Body of Liberties (1641) against "bond slaverie"; while it remained for the Virginia Bill of Rights (1776) to enounce, *eo nomine*, the right to liberty abstractly.

The Latin mind however moves in an orbit of logic and abstractions. Inheriting a civilization of ordered law, not of forest liberties, it knows what it is about, and carries conclusions to their ultimate. After the long Anglo-American blundering through to light, culminating in full documentation only at the American Revolution, the torch of liberty was grasped, in the abstract, by French philosophers—not, of course with no concurrent luminaries of their own, Montesquieu, Diderot, Rousseau—and carried, in theory at least and for a short time, to a total incineration of all control or restraint. For even the imprisonments or executions of the Terror were regarded as but effecting the removal of the Old, that the New might grow unhampered. Robespierre, or the Triumvirate, were not thought of as an autocratic Executive, but administrative officers merely of the people's will.

It is this logical and complete character of the French

revolution toward democracy—however brief—that makes it so important for our consideration. Its very self-consciousness fits it for our primal study and makes of it the bound where modern democracy in action begins (we were in no sense yet a broad democracy). Even England was but the nursery whence the young Tree of Liberty was taken. And here in our study we may part company with the ancients, agreeing with Mr. Henry Ford that their history, on this point, has no lesson for us. For their democracy was neither national nor self-conscious; and their liberty did not include the individual. Many and misleading are the lessons that have been drawn from them, and to little purpose except to satisfy the desire of our nation-builders for precedent; the Achaian League, for instance, filled more speeches and more text-books in their time than it ever did in ancient Greece. Moreover such lessons as our constitution-makers considered, were political. They related to the frame of government; the one study, I may say, of our classic authorities save only a part of de Tocqueville—whether it should be Federal or Unitarian,\* republican (i. e., representative) or democratic.

But political liberty, though it bulks largely in all the treatises down even to Bryce, is, for true concerns of humanity, the smaller part of the thing. It matters little whether the state is headed by parliament or king, compared with the question whether the man or woman is free, happy, prosperous, enlightened under it. Paine indeed thinks of liberty as against government. But our ancestors very largely confused it with the independence of the British Parliament. Yet probably the very largest freedom of the other, greater liberty—dimly apprehended by historic seers such as Henry Adams rather than by too trained and learned minds like

\*I of course use this word in its South American sense of "centralized"—a political system which no other one word describes.



Austin—known to recorded or traditional history is to be found, long before the Saxon invasion, among those Teutonic ancestors of ours who both made and judged and executed their own laws.

How far was individual liberty the conscious aim of, in the first place, the French Revolution; then of the other democratic movements of the nineteenth century; and after? The former, from this viewpoint, may be dismissed in a few words. Beyond a vague, abstract statement of equality—which Fisher Ames would have said is in itself incompatible with liberty—its leaders did no such actual work at all. They wished to dethrone the king, and substitute the Age of Reason; but who was to find the Reason? Themselves. At all events, before they could even constitute a legislative body, the guns of Napoleon blew them away. Nor did they get to the point of establishing an elective administrative; the Council of Terror was nothing if not administrative, and they had no idea of abolishing its control. In short, liberty of the sort we are discussing was but a sounding abstraction with them. Political liberty—between the death of Robespierre and the advent of Napoleon—may have been measurably achieved. But the French Revolution is important for its ideas rather than its achievements, immediately at least. It dethroned a king. The Great War dethroned three emperors,—and yet, in its results, may prove the more sterile of the two.

For the one thing the French Revolution did do was to make Liberty, in its broadest sense, the watchword of occidental civilization, the dream of aspiring humanity. But all through those times, from Rousseau to the autocratic reaction, the treaty of Vienna, and the Holy Alliance—as again in the democratic recrudescence of 1848—it was always taken for granted that liberty was the great end sought. Never pausing to consider how even mere political liberty

would function, nor even whether it would bring about the broader individual liberty, they regarded it as a *Ding an sich*, an end, not a means; assuming, as a thing undisputed, that it would of itself bring the largest measure of human well-being, the highest equal plane of individual happiness possible in a world still subject to plague, pestilence, and famine. Just how they would rule it, or who would rule it, or whether there should be any rule at all, was never considered. The French revolutionists had not yet before their eyes the lesson of the Bolshevik; and New England, where indeed they had the object lesson of the action of a people seeking only religious liberty and yet denying even this to others, was a province too remote for their consideration.

What has been the achievement of the last one hundred and fifty years; what has been the result, the output, the social consequence of that full liberty, so far; and what is to-day's tendency? Political liberty has been achieved in the Western European world, in English America, Australia, and, the form of it, more completely than anywhere, in Spanish America. And true Democracy may be seen fairly established in Swiss, Scandinavian, and French Europe; the governments of Italy and Spain are for the moment anomalous. Possibly Poland, Finland, and Czechoslovakia may be deemed established democracies. Of Germany, most important of all, and other Baltic or Balkan states, it is too soon to speak. We have thus experimented in political liberty, in Switzerland for many centuries, in the United States for 150, South America 110, France 58, England, dating from the Reform bill, 97, or, if you prefer the Bill of Rights (which so respectable an authority as Haydn's *Dictionary of Dates*, 1851 edition, calls "the only written law respecting the liberties of the people except Magna Carta"\*) 240 years.

\*Haydn quotes the Declaration of Rights, made to Charles I in 1628, which of course never went into effect. The Bill of Rights was imposed on William III in 1689 as a condition of his becoming king.

Sufficient time, surely, in all these countries, for some experimenting.

Now we may at once exclude South and Central American republics from our laboratory: for while their political liberty exists only in form, individual liberty is in theory conceded in complete degree, and social liberty more fully than is ours in the United States. Being European in descent, they have this tradition; and government concerns itself only with government, not so much with property or private rights; the more advanced, such as Argentina, being French in spirit, and Roman Catholic, they leave the regulation of the individual's living to the Church. (The reader must not confound the liability of the citizen of many Spanish American republics to spoliation or even execution at the hand of some enemy, military dictator or *cacique*, political leader, or as we should say boss; this is not like a denial by law of individual liberty, but the general failure of political liberty, though prescribed by their own constitutions, to be enforced by their people in action; as well say that we are not a prohibition country because we have bootleggers.)

And as our first and most obvious study must be private legislation—that being, like the guinea-pig, the easiest subject for laboratory researches—we will also leave out all countries save the English-speaking ones and France, Belgium, and Switzerland; for in these democracies only has there been conscious and intelligent legislation, making new law, for any considerable period of time. And our forty-eight States, more even than our national legislature until perhaps recently, remain the most fruitful field for the political sociologist, the student of constructive democracy.

The second of the articles which suggested this work was published in 1894 (*Scribner's Magazine*, vol. 15, p. 648) under the title "The Ethics of Democracy—Liberty." The method of treatment, in a popular magazine, was naturally

more lively in tone than is fitting in a serious treatise. Nevertheless, while obscurity is not profundity, neither does lucidity betoken superficiality. Long words and abstract phraseology gain the respect of the sciolist; but it may be questioned if many modern works on metaphysics, economy, or sociology would retain even their respect if translated into the concrete and simple English. As the jargon of the medic was invented to cover his ignorance, so the academic verbiage will hide one's mental nakedness from the laic. They love the word, "problem." Every question is a "problem," in newspaperese. Yet the world is simpler, and creation saner, than appears to those who like high words better than deep thoughts. But not one person in a thousand can think in abstractions; hence the opportunity of the obscurantist.

As the first, and in America the only, thing desired by democracy was Liberty—(the French added equality, but Jefferson succeeded in getting this word into the Declaration only, not the Constitution, for the men who made this were logicians and knew that equality other than political was impossible with liberty, even were there no recognition of private property)—our first task will obviously be, before proceeding to the constructive part of our book, to see how far it has realized this. And we have an advantage in that forty years have elapsed since our first chapters were penned, for we now have a substantial angle of time from which to check results. As a geologist places a mark by a glacier and waits a quarter century to calculate its flow, let us take the Encyclopædists, Rousseau, Tom Paine, Jefferson, Lieber, and see how far the democratic stream has run beyond or behind their predictions and their aims.

The notion of abstract individual liberty is comparatively recent. Although included in the French revolutionary declaration of the Rights of Man, in the writings of Paine and

other pioneers it gets but a scarce mention; the bulk of their literature, as of their thought, is directed to man's liberty from *government*; that is, from autocratic or super-imposed government; their goal is no farther than a republic, or at most, representative democracy. This once realized, it was always assumed that political millennium would be reached; the "rights of man," whatever they were, would nevermore be infringed, and all political evils *ipso facto* would vanish. Democracy would forever make men free. But so meagre, almost casual, was the mention of individual, social, liberty as distinct from the mere form to vote their government or its officers, that the conclusion is inevitable either that this matter was not much in their minds or that they thought quite axiomatic its necessary result from a government democratic in form.

Thus, earliest and most compendious of all, Locke's words, written in his *Civil Government* (1690):

"The natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative power of man, but to have only the law of nature for his rule";

or that men, being

"by nature all free, equal and independent, have the right to the uncontrolled enjoyment of their life, liberty and estate";\*

and Thomas Paine again:

"In England, no parent or master, nor all the authority of Parliament, omnipotent as it has called itself, can bind or controul personal freedom even, of an individual beyond the age of twenty-one years" (*Rights of Man*, London, 1791, p. 10).

And again, at page 48,

"Natural rights are those which appertain to man by right of his existence. Of this kind are all the intellectual rights, or rights

\*Quoted from J. T. Adams, *Revolutionary New England*, p. 97.

of the mind, and also all those rights of acting as an individual for his own comfort and happiness which are not injurious to the natural rights of others— Civil rights are those which appertain to man in right of his being a member of society”

—i. e., what we above call *political*.

“Every civil right has for its foundation some natural right, pre-existing in the individual, but to which his individual power is not, in all cases, sufficiently competent. Of this kind are all those which relate to security and protection.”

And, citing as a typical natural right, religion, he goes on to say, luminously,

“Every civil right grows out of a natural right; or in other words, is a natural right exchanged” (p. 50).

“Civil power, properly considered, as such, is made up of the aggregate of that class of the natural rights of man which becomes defective in the individual in point of power—”

But,

“The power produced from the aggregate of natural rights, imperfect in power in the individual, *cannot be applied to invade the natural rights which are retained in the individual, and in which the power to execute is as perfect as the right itself.*”

And so, under Paine’s inspiration,

“The first (monarchical) French constitution of 1791 says: ‘Liberty consists in the right to do everything that does not injure others. Therefore the practice of the natural rights of each man has no other limits than those which secure the other members of society the same rights’” (Lieber, *Civil Liberty*, p. 34).

Let us then take (ibid., p. 110, Paine’s translation)

“Declaration of the Rights of Man and of Citizens by the National Assembly of *France*.”

“The Republic of the People of France formed into a National Assembly, considering that ignorance, neglect, or con-

tempt of human rights, are the sole causes of public misfortunes or corruption of government, have resolved to set forth, in a solemn Declaration, these natural, imprescriptible, and unalienable rights . . . doth recognize and declare, in the presence of the Supreme Being, and with the hope of His blessing and favour, the following sacred rights of men and citizens:

- I. Men are born and always continue free, and equal in respect to their rights. . . .
- II. The end of all political associations is the preservation of the natural and imprescriptible rights of man; and these rights are liberty, property, security and resistance of oppression.
- III. The nation is essentially the source of all sovereignty; nor can any individual or any body of men be entitled to any authority which is not expressly derived from it.

[This last clause is diametrically opposite to the Anglo-Saxon idea and the American Constitution; the people are the source of all sovereignty, and the nation (State) is their creation.]

- IV. The right to property being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity. . . ."

These four only, out of the seventeen paragraphs of the famous Declaration, cover natural rights (and the last would be questioned to-day)—all the others are political. Now this dates later (August, 1789) than our Constitution (September 17, 1787), which only mentions the cardinal one, liberty, and that in the Preamble and abstractly; though both life and property are inserted in the Fifth Amendment (September 25, 1789) evidently in echo of the French formula. However, all these and more are claimed in earlier constitutional documents, notably the Massachusetts Body of Liberties (1641), the Declaration of Independence, and the State constitutions of Virginia (1776) and Massachusetts (1780), which further include the rights to "happiness" and "safety," "freedom of speech and of the press,"

"petition," "assembly," and religion, and security of the home and person from inquisition or search.

Paine truly adds that the first three articles of the French Declaration comprehend in general terms the whole of a declaration of rights; all the others either originate out of them or follow as "elucidations." "What were called formerly Revolutions were little more than a change of persons . . . what we now see in the world from the revolutions of America and France are a renovation of the natural order of things" (p. 158).

The earliest expressions of all these natural rights, in Anglo-American constitutional documents, will be found summarized and arranged in my *Federal and State Constitutions* (pp. 76-79); to which, to save space, I may here refer the reader.

Such was the covenant of modern democracy; the great charter it promised to man of his sovereign rights. Before going on to trace its legislation in detail we have to pause, even at the starting point—as the Arab caravan halts and camps after the first few miles to see what it has forgotten. The deeds of men, or the stars in their courses, have given us Anglo-Saxons liberty; before Democracy started forth on its career of power, it had won this. It has now set forth to win much else; it has undertaken, Godlike, to *will its world*. And we are hardly on the threshold of departure; yet, before proceeding, it already becomes necessary to ask this question—are we free? For freedom was the dream, the cause, the reason, of the people's rule; not useless baggage to be thrown over at the start.

To answer this, I then (1893) made a careful study of our latest legislation, taking as examples the years 1889-90; and the results would not be different in 1928-9, only (particularly as to Federal legislation) even more accentuated in



the same directions. I tried carefully to prepare an analysis of the nature of the legislation of all the States, and gave a summary of it. It fell into three classes: laws unsocialistic, that is the ordinary statutes regulating society as it stood according to the ideas above expressed, therefore colorless from our present viewpoint; laws which we termed *individualistic*; laws communistic or socialistic—words commonly used interchangeably but fundamentally different in meaning—and laws of an anarchistic tendency, if there can be in logic any such except a statute repealing laws. Necessarily such a division must be left to the fairness of the tabulator; but, in accordance with the definitions of communistic and socialistic hereafter given, I believe it was accurate.

During those two years our forty-nine sovereign States and Territories (or fifty, counting the national government, perhaps the rashest experimenter we have; Oklahoma had not then been organized, a rasher experimenter still) enacted about thirteen thousand laws, many a one of which was considerably longer than the entire code of Justinian. The greater number of these statutes, however, concerned matters of merely local interest—city charters and the like. Of course, there is no class of statute where greater interference with individual rights is attempted than in this very one; the loss of liberty under bureaucracy, before Boards and Commissions; nevertheless, on account of their miscellaneous content, it was impossible to classify them, and they are not of general application throughout the State. Leaving them out, as well as all merely regulative or administrative acts which involve no principle of social science or control, the number of laws actually examined and analyzed was reduced to about twelve hundred. What proportion of these might fairly be said to involve a socialistic principle? For, without in the least taking the position that socialism is not a reasonable scheme to be fairly considered (we shall later devote

a whole chapter to it), all socialism must be admitted to clash with the classic democratic conception of individual liberty. Under its head I included such few laws as I found which were in essence communistic, for, as the term *socialistic* is properly applied to laws which in *any* way limit personal or civic freedom as it has developed in Anglo-American history, so *communistic* would mean those laws which limit such civic rights in the single respect of *property* alone. I also noted such statutes as might be defined as *individualistic* because they asserted a new individual right or liberty, or reasserted with emphasis one which had been lost sight of, or developed its application. Laws not socialistic but yet not definitely individualistic, that is, the general mass of legislation—such legislation as would be proper, let us say, under the *laissez-faire* school—I left under the general head of unsocialistic—that is, I put, as laws socialistic in fact or tendency only those which must clearly be admitted to be so; anything which could fairly be put under “allowable” socialism, such as laws concerning free education, roads, drainage, water supply, the poor, and all public use of private property for such or for other usual public works, eminent domain, whether for State or city or private money-making purposes, what we now call public utilities, I left under the head *unsocialistic*.

Out of these 1,191 State or Federal laws, the first striking fact was the very small number (17) of new statutes which could by any possibility be said to embody any assertion of individualism. This is because both our national and the States' Bills of Rights assert it. But there were as many as 342 socialistic laws, against 832 laws “colorless” from the present point of view, that is, embodying no socialistic or other radical principle unknown to the democracy our ancestors founded.

But perhaps the most interesting subject for consideration

is the relative extent to which this socialistic wave had gone in the several States. It was least in the States of highest general education, and also those which are commonly considered the least intelligent. Evidently, States where there is a low level of popular instruction are not so quick to take up new nostrums for the mere lack of new ideas, the mere conservatism of stupidity; while States such as the newer Northwestern, the Dakotas, Minnesota, Idaho, Montana, Wyoming, composed of heterogeneous peoples with a common education of a superficial nature, and, as Rénan said of us, no serious superior instruction, would naturally be the most ready to follow the lead of agitators and adopt new isms. In these States the active American mind is most quick to invent, and least deterred by the doubts of culture and the lessons which come from the experience of history. Therefore we found that the section of the country which has the least of socialistic statutes was New England, having less than 20%. The far Western States had the next lowest; but their average was probably brought down by the supineness of the State of Nevada and the comparative conservatism (then) of States like Oregon, California, and Spanish New Mexico and Arizona. The Southern States came next, I think for the reason above mentioned. Moreover, in all these States the more educated classes in the North, the whites in the South, are in control. There is no corresponding class control in any other section of the country. The great Middle States, New York, New Jersey, and Pennsylvania, came next, but with a long jump of from less than 23% in the South to more than 34% in these three; while the rashest experimenters are, as one would suspect, in the North and Northwest, the States of Ohio, Iowa, and Nebraska being the farthest advanced (now it would be Oklahoma and the Dakotas). "In these two, more than half the legislation of the last two years infringes on the liberties of the individual

beyond the bounds of allowable socialism as determined by the practice of England [written in 1893] and the other States of this country."

Several picturesque individual examples might be mentioned. Thus, South Carolina was the only State with no socialistic legislation during the period studied. Vermont and Massachusetts, Connecticut, half the Southern States, and Utah, had hardly any. "That the Dakotas had only 7% of socialistic laws is probably explained by the fact that the period covered was the time of their being organized as States, when they were still too busied with the frame of the State government to get the experimental laboratory of their lawmaking fairly to work; a much larger group of experiments may be expected of them in the next few years." This prediction was fulfilled; they, with Oklahoma, are almost completely socialistic in many important matters, such as banking, transportation, elevators, insurance, the levying of taxes, education. (Laws which take away from parental control the education of children of course fall within our definition of socialistic.)

Now socialistic advance undoubtedly proceeds *pari passu* for a long time with what is commonly considered progress. For instance, Georgia is a more progressive State than its neighbors South Carolina and Mississippi, and it had more socialistic statutes; New York had more than double the proportion of New Jersey, Ohio twice that of Indiana, the Virginias more than North Carolina, Kansas more than Missouri, California than Oregon, and so on. Progressives will find encouragement in this fact.

We found, therefore, that out of eleven hundred and ninety-one laws enacted in those two years, there were, excluding "allowable socialism" (as we may term paternalism in subjects where it has long been used by English or American states) still three hundred and forty-two statutes em-

bodying socialistic principles and radical in their nature; that is, laws applying to new subjects or to new fields of State interference. In other words, nearly twenty-nine per cent. of our general legislation throughout the land embodied some restraint upon liberty as it has been understood in the law or custom of English-speaking peoples.

Has the tendency been greater, or less, since 1890? Greater in England, or in the United States? Starting with Lloyd George's compulsory insurance and old-age pensions, touching its high point in the "Defense of the Realm" Act, "Dora," not yet repealed, and ending in the dole and the state subsidy to coalminers, our most radical legislative experimenter must look with admiration on John Bull. That individual, as such, is in his last ditch; drink, the first to go by the board with us, is his only breastwork left standing!

Yet it should be borne in mind that this difference is not due to the greater conservatism, still less caution, of our legislatures, but to the American Constitution. In England there is no Constitution above Parliament. And many similar laws, particularly during the War, were enacted with us, especially by the Federal government, of late our most radical offender, and were found by our Supreme Court to be in conflict with our higher law, the Bill of Rights in the Constitution. Nor has our energy appreciably slackened since the War; witness the Oregon statute forbidding parents to educate children in private schools, recently "killed"\* by the Supreme Court, which would indeed be impossible under public sentiment in England; or the Federal Child-labor Act of Congress, placing with the Washington government the control of the labor of all persons under 18, but decisively re-

\*"Killed," a newspaper headline commonly employed; such improper phrases are largely responsible for the popular prejudice against one (and surely the least dangerous) of the three co-ordinate branches of our government; this statute never was law, nor was it "killed" by the Supreme Court, but by the orders of the people as in the Constitution expressed.

jected by the people of the States; the similar Maternity bill now pending (and since this was written, enacted); the proposed farm-relief measures; and many others.

What was the history of our achieving freedom for the people and liberty for the individual? Social liberty, religious liberty, intellectual liberty, trade and labor liberty, as well as political? For in human importance, outside of the purblind histories of dynasties, Hastings is less momentous than Runnymede, Blenheim than one signature of Lincoln in a White House library. And almost the greatest victories of this liberty were won in, and are recorded in the dusty records of, the quiet courts of English law.

Now feudalism did this: it created the individual. The modern man was created in the castle; a castle became every man's house, and then every man became anxious to emancipate himself from his feudal overlord, every town from the Crown, every trade or guild to make its own laws. And much of the legislation that has been attempted in modern America was tried centuries back in England, only it was tried at the behest of the upper order, not the masses. The old English statutes are full of attempts by the powerful class, whether landowners or rich burghers, guilds or corporations, to legislate away freedom of contract. The history of the Englishman's economic liberty is the history of that contest against such regulation, which finally became completely successful after the Commonwealth, hardly before the Victorian age; and these same weapons of privilege, so recently wrung from the "classes," are the same ones which now the "masses" seem too ready to take up.

In a little pamphlet called "Socialism at St. Stephen's," published also about 1890, Lord Wemyss found that one hundred and thirty-four bills "more or less of a socialistic character," were introduced in Parliament in the years 1886 and 1887. Then as now it would be interesting to compare

the English and American proportion, but the data are wanting, for we have no way of studying the *bills* introduced in all the American State legislatures. On the whole it may be said that of late years the English measures in economic matters, land tenure, unemployment (in this they have almost gone to the extreme of the second French Republic, which created state ateliers\* for the out-of-work and created a new natural right, the "*droit au travail*"), have far outstripped ours, particularly in the dole. But this is perhaps due to the Great War, and, before home rule, to the extraordinary Irish problems. In social matters, marriage, parental authority, education, they are far more conservative than we. They handle rights of property quite without the gloves of a constitutional restraint, and, in the face of a famous clause in our own Constitution, hardly an Act of Parliament is now passed that does not contain the clause, "all contracts to the contrary notwithstanding." But they have not gone nearly so far as we in laws curtailing individual liberty or controlling private life.

Now the ideal liberty—autocratic government having been overthrown or abandoned—means broadly the absence of control of a man's functions or activities by the government he has elected, except only so far as to protect him from the actions of others. Laws going farther than this are laws restrictive of liberty. If they seek to control his liberty of action, direct his thought or speech, determine his faith, regulate his activities, we term them socialistic; if to seize or take the revenues of his property, communistic. Such laws may range all the way from sheer tyranny by the state down to reasonable regulations of life or labor in the general inter-

\*By the provisional government. But the first elected legislature, a few weeks later, in 1848, calling itself a Constituent Assembly, fifteen days after an attempted still more radical revolution, "decided to close '*les ateliers nationaux* devenues une source de gaspillage et un foyer d'agitation' [a source of waste and a centre of disorder]."—J. Bainville, *Histoire de France*, p. 480 (1924).

est, but the principle must still be classed as socialistic whenever it is to control the individual in actions otherwise lawful because it suits the ends of society or the abstract "State"; communistic when invading the institution of private property either by doing away with it entirely or regulating its use or enjoyment. Communism is not in theory inconsistent with individual liberty in other affairs than property. Individualism—the word I ventured to employ in 1888 to designate the state of society then existing, though no such meaning was then given in the dictionaries\*—means simply the full recognition of both liberty and property rights, even as against the state, limited only by necessary taxation, eminent domain, and the police power. Carried to its extreme, individualism becomes anarchism, just as socialism becomes serfdom to the state. They are the two extremes, anarchism and socialism; individualism and communism occupy a middle ground; yet communism and socialism are not identical, although the latter may include the former. Private property might be recognized though a man's actions in relation to it were controlled (as is largely the present case); or it might be denied and still no other restriction be placed on individual liberty. The one speaks only in the field of action, of a man's will; the other in that of property, what he possesses. The world's thinking is still confused, on account of its confusion of these two words; naturally enough, for property is so closely related to a man's action, even to his very life, that it is most men's principal aim, their "pursuit of happiness"; to control or deny it seems to them like a denial of the higher right of liberty. Thus the two rights are hard to disentangle. The average unreflecting man doubtless regards his individuality as in the main composed of his labor occupation and his acquisitions thereby; and in the former he uses property already existing in order to reproduce property; while the latter

\*I have found it since in Lieber.



is property of the most sacred kind, the only sort recognized in the radical Constitution of Oklahoma.

## 2. PROGRESS OF SOCIALISM

What are the principal subjects of these socialistic and communistic statutes with us and in England? In England, in the following order of number and frequency, Land and Houses, Trade in alcoholic liquor, Manufactures and trades, Working-class Dwellings, Education, Ships, Mines, Railways, Recreation, Sanitation. But of these ten classes we rank at least two—Education and Sanitation—under the head of allowable socialism; and we should probably add three more—Ships, Railways, and Mines—and, by practical necessity another still—Trade in alcoholic liquor. This summary was made on our tabulation of 1893; and leaves but four classes of English socialistic legislation which to-day we should question. But since then it has made giant strides,—in the dole; in general old-age pensions without regard, as is had in Germany, to the applicant's labor record; in compulsory insurance and employers' liability; in state guaranty of employment (the French *droit au travail*); in subsidies to essential industries, such as coal-mining, with an evident tendency to the nationalization of such; in pensions to all widows, mothers, the unemployed\*—only not to soldiers—so that taxes fall on the property owner and the industrious wage-earner for the support, not only of the aged or disabled, but the idle and improvident as well.

In none of these particulars have we kept pace with England. Our general service pension, the only measure in which we have matched their extravagance—or shall we say their free use of tax moneys?—is the one thing they have not done.

\*See *The Disinherited Family*, by Eleanor F. Rathbone, London, 1926.

And of these four classes remaining, one—land legislation—is not necessary in the United States. How fortunate we are may be seen from this appalling list of titles taken from our 1893 summary:

“Landlord and Tenant, Agricultural Holdings, Ground Game, Arrears of Rent, Purchase of Land, Compensation for Improvements, Corporate Property Security, Crofters’ Holdings, Leaseholders’ Purchase of Fee, Peasant Proprietary, Suspension of Evictions, Allotments and small Holdings, Compulsory Purchase of Land Compensation, Cottagers’ Gardens, Crofters’ Land Cultivation, Tenure of Land and Town Houses, Stannaries, Agricultural Laborers’ Holidays, Laborers’ Wages, Laborers’ Relief, Mining Leases, Mining Royalties.” The very foreignness of these titles to our mind shows how little we have been troubled by such questions; due to our vast public lands, freehold tenure, and homogeneous social condition, as well as, in the older States, the constitutional abolition of estates tail, primogeniture and other incidents of feudal tenure (they did have land trouble in early nineteenth-century New York).

There remain, therefore, only three subjects generally handled by socialistic legislation, and which are not necessarily to be classed as “allowable,” which are common to England and the United States—the general regulation of manufactures and trades and commerce, and railways—to this we should now of course add “public utilities” in general. And since this article was first written, the control of all such, at least through their rates, confirmed by the great stride made by our Federal government when it gave to the Interstate Commerce Commission power to legislate the rate schedule as well as adjudge it, has definitely placed such state control of industries previously private within the field of the “allowable.” And as to manufactures, trade, shops, commerce, and all employment, it is difficult to forecast how

far the Federal Trade Commission may go, or similar bodies in the States. American legislatures appear to-day to consider any enterprise or industry a fit subject for state control "where two or three are gathered together."

Australia and New Zealand, though more radical by far than we or even England as to labor matters and taxation, are in other respects more conservative. In immigration (except for the "natural right" of free locomotion and the American doctrine of the right of expatriation) they are with us—excluding Mongolians and Japanese.

But we, while even bolder than the English in applying paternal legislation in matters supposed to be moral or of morals, were far less ready to lay the hand of the multitude upon the life of the individual in matters which affect his property and his right to contract concerning it—except when such property "served a public use," or was in the hands of a corporation; and always of course excepting the matter of taxation, where the American democracy has shown itself reckless. We show a greater variety of interference, but on the whole less radicalism. Nevertheless we have made a wide, if not deep, beginning. In 1893 we could trace the anti-individualist if not socialist legislation into fourteen classes, naming them again in the order of their frequency:

Liquor laws, Labor laws, Regulation of manufactures and trades, Debtor and creditor laws, Regulation of houses and buildings, laws concerning Veterans, Pensions, and the G. A. R., Sons of Veterans, etc.; laws concerning general morals (not before criminal matters); laws concerning Children; Women laborers; Race distinctions, Intermarriage, etc.; laws extending municipal functions; Bounties and Subsidies, State or local; Libel laws or laws removing the common-law protection of reputation; and laws forbidding associations of business or capital (Trusts; to be discussed

later ; but that they rest on a different principle, such laws are of course anti-individualistic).

Now much of this falls undoubtedly under the head of allowable socialism; no one, in view of the 18th Amendment, would presume to question the permissibility of liquor laws, though not imposed for the excise, any more than the most daring Democrat to-day a tariff not for revenue; but it would be interesting could we know, by a general consensus of opinion, just how much. Most of such legislation is imposed by active minorities. And just how far our people are willing to subordinate the life of the individual to the ordering of the majority is the great question of the future—even greater than the question whether property rights shall be maintained in their present form or not. And others of these laws may at first glance seem hardly socialistic at all unless we keep carefully in mind that any one is such which subordinates an individual action or possession, previously free, to the social welfare. Among the communistic, more easily recognized than the socialistic, very few in number, we may class pensions in general, grants to soldiers or privilege to them or sons of soldiers, artificial prices for labor because performed for the State or a municipality, special instruction for certain trades or classes at public expense; public amusements, music, "forums," racing, menageries, baths, forest preserves, State experiment stations, agricultural or industrial, and such trifles as distribution of seed grain to farmers, etc., to most of which few of us have the least objection; indeed it is hard to say whether all but the last are not socialistic rather than communistic, the distinction being that the latter are concerned solely with the taking or redistribution of money or property, but the former regulate or prohibit men's mode of life, or actions, or contracts, either among themselves or toward the state. But far the most significant is the adoption in recent years of graded income

and inheritance taxation, both State and Federal; a revolutionary step that only a great war could bring about for the nation, and still perhaps unconstitutional in the older States.

Among these the example now familiar to all of us is the prohibition law, now removed from practical attack by its asylum in the Federal Constitution. "Liquor laws we may lay aside as too familiar to need notice," I said in 1893, "and, short of absolute prohibition, their propriety would be recognized by nearly all; though even here the German Personal Liberty leagues exist to warn us that the right to legislate on this subject is not quite unquestioned." This vaticination needs no comment to-day. But sociologically, not controversially, speaking, it remains the striking instance where democracy has outstripped the speed limit set for it by its fathers and rendered nugatory the Tenth Amendment.

In the "regulation of manufactures and trade" we found a large mass of miscellaneous legislation; first the regulation of rates, not only in public utilities but even private businesses, like elevator charges, millers' tolls, cotton compress; not yet, as in the Middle Ages, the price of bread (though we shall find that we approached such legislation in the Great War)—but all this belongs rather in our Property chapter. Then many laws regulating, restricting, or even prohibiting certain trades hitherto recognized as free; oleomargarine, milk and its products, interstate trade in cattle, and the innumerable inspection laws, not only for sanitary purposes but official grading, license or classification, stamping of leather, official trademarks, official inspection. Among labor laws those restricting the time of labor of women and even, in an increasing number of occupations, of men; methods and appliances in factories, shops or mines; method of payment, weekly, and in money, not by check (whence the possibility of payroll armed robberies); prohibiting "company" doctors, shops, dwelling-houses, in-

surance or pension funds; prohibiting (as for joining a union) or regulating (as by requiring the employer to give written reasons and not to exchange "blacklists") the laborer's discharge; laws (usually municipal) in effect requiring the employment of union men, as in the Pennsylvania anthracite coalfields; prohibiting fines or discharge (without onerous machinery) of employees for fault or imperfect work; arbitration of labor disputes, and removal of labor unions, strikers or boycotters from the common law of conspiracy; requiring union labels, thus indirectly recognizing a boycott as lawful. Laws requiring qualification, examination, state license for countless trades hitherto free, from peddlers, blacksmiths, plumbers, employment agencies, to lawyers, doctors, almost any one except clergymen and bootleggers. That most of these have justifiable aims is not the present point. Still more justifiable are all those relating to women's work, hours, seats, time of day, moral surroundings, vacation after pregnancy (not yet so advanced, in many details, as the legislation of either Belgium or Germany), and to child labor; all these we class as "allowable"; so preference for laborers in insolvency; exemption of them from taxation, on their tools, etc. But the *graded* income tax or inheritance tax cannot be classed otherwise than as distinctly communistic in spirit, however much we may approve, being aimed definitely at a redistribution of wealth. Debtor exemption laws, too, proceed to an extreme in some States, Texas for instance, where the most just creditor cannot enforce his claim against the land and house, the horse and carriage (automobile?) of his debtor, or even his luxuries—while in Massachusetts only his necessary personal belongings, or, in most States, tools of trade are exempted.

The universal building restrictions, for the public health or safety or even convenience, belonging rather to property limitation, with the rapidly increasing zoning laws or town-

planning, may come later; heights of building, city monopolies, public transportation, tax-aided public utility plans, all such are socialistic on the property side. And when we come to individual action, we were more conservative, though not so much so as in England, while they were less conservative as to property rights. Liquor laws are our great exception. In most States we regulated the sale of cigarettes to minors or even prohibited them entirely. Two Mississippi statutes attempted to regulate morals in general. In Minnesota drunkenness was declared a crime: in most States, fornication, in all, adultery. The moral tendency of democracy to make sins into crimes is notable, except always sins against honesty, such as the bearing false witness, or fraud in general; and not only sins, but mere State regulations, covering matters neither sinful nor otherwise, elsewhere or previously, unlawful—surely, a misleading tendency and one to be checked rather than extended. And in all States, the more lax the divorce laws, the more severely they treated marital offenses, thus tending to make all such matters rather of State license than of conscience. And, in all our States, the more free in social fact we find the relation of the sexes, the more strictly do the laws profess to punish open profligacy. The tendency of all law-made virtue to hypocrisy is already shown, and is often depicted in our novels of village life in the newer, more radical States.\*

Up to 1890 seven States had made laws for the State education and control of children, which fairly seem to overstep the line that preserves the home from State attack. All States of course provide for the rearing of abandoned chil-

\*See E. W. Howe, *Story of a Country Town*, and his article in the *Forum*, August, 1892. And while we Americans understand it as an accident, due to our dual form of government, a Martian visitor would surely comment with amazement that United States law with all its energies and resources makes criminal and punishes the drinking of wine or beer or travelling with a lady not a wife between the States, but not murder, robbery under arms, rape, or arson!

dren, the reform of vicious boys, but many of these laws go farther. The laws "emancipating" women we may now leave aside, washed away in the general flood of the Nineteenth Amendment; anyhow, they were rather individualistic than socialistic. Women have now all but the duty of military service, all contractual right or property that men have, even as against their husbands, and have so far conserved most of their privileges.

Racial distinctions are still recognized in our laws. While life insurance companies were by law in many States compelled not to discriminate against negroes, marriage is in many forbidden between whites and persons of color, even down to one-sixteenth of negro blood, and sexual intercourse between them made a crime more severely punished than fornication between persons of the same blood; in Utah, marriage was forbidden with Mongols; but in almost none of the States with Indians; we have always retained some respect for the original owners of our soil, however unjustly we treated them.

Some States still artificially encouraged immigration; a few gave bounties, or exemption from taxation, to certain industries. But this was mainly done by the cities and towns; and up to that time the most socialistic of all our experiments was in "gas and water" socialism: the engaging by cities and towns in ordinary profit-earning industry, not only lighting, heating, water supply—which seemed to mark rather the norm—but in street railways or other transportation, ferries, buses (the present law in Boston, New York, Cleveland or other cities for meeting a deficit in street railway operation is of course socialistic), and also in ordinary breadwinning occupations, coalyards, bakeries, beet sugar, fish culture, or any business or agricultural experiment. But these were few. The line was pretty fairly established that a town might light, warm and instruct its citizens; give them



free libraries, museums, parks, playgrounds, baseball (since then, golf) fields, free concerts and galleries, perhaps transport or entertain them; but it could only give them water, not food or clothing save *in forma pauperis*. The line was drawn at the point of the entering by town or city governments into ordinary money-making businesses, requiring neither by natural conditions nor great complexity the public interference.

So far went the tale, in 1890; not a heavy one, after all; yet heavier perhaps as to liberty than as to property rights.

The statutes definitely individualistic were of course few; as individualism is the point at which we started and is largely enshrined in our Constitution. We find some laws prohibiting restraint of trade (from this point of view the "trust" statutes may be reckoned as individualistic as from another they are socialistic, depending on whether they are aimed chiefly to prevent monopoly or restraint of trade or reasonable joint action and contracting together); laws preventing the influencing of laborers by threats, etc., either by capitalists or co-laborers; laws preventing the bribery or intimidation of voters; imposing a maximum for State or town taxation (often, in Southern or Western States, in the Constitution) or laws extending or fortifying a common-law right, such as those making new penalties for the slander of women, protecting one's right of privacy, giving new remedies for the destruction of his trees by a telephone wire or the pollution of his air by a factory or mine.

But by far the most important of the assertions of individualism are to be found in our constitutions, State and national. The safeguarding of the individual against the law-making majority is the principal object of the Bills of Rights contained in all our State constitutions and in the first ten and the fourteenth Amendment to the Constitution of the United States, all going back historically to the struggle for

personal liberty in England. It is usually expressed as follows: "To guard against transgression of the high powers delegated to the legislature by this Constitution, everything in the Bill of Rights is declared to be excepted out of the general powers of Government, and shall forever remain inviolate; and all laws contrary to the Bill of Rights are void." And some State Constitutions declared (the Virginias and New Hampshire and Alabama) that "some rights cannot be surrendered by men when they enter into a state of society, but are inalienable, because no equivalent can be given for them," and (in New Hampshire): "When men enter into a state of society they surrender up some of their natural rights to that society to insure the protection of others, and without such agreement the surrender is void." In the Declaration of Independence, "All men are . . . endowed by their Creator with certain inalienable rights. . . . That to secure these rights governments are instituted." The Tenth Amendment: "The powers not delegated to the United States . . . by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." And in most State Constitutions: "This enumeration of rights shall not be construed to impair or deny others retained by the people." Like words are used in the federal Ninth Amendment. And in many States the Constitution declares: "A frequent recurrence to fundamental principles is necessary to preserve the blessings of liberty." In Kentucky: "Absolute, arbitrary power over the lives, liberty, or property of freemen exists nowhere in a republic, not even in the largest majority."

And the change in our fundamental law since 1890 has been only for greater conservatism, except in Oklahoma. Thus, Wyoming adopted the Kentucky provision just quoted; the Washington, Arizona and Utah Constitutions declare that "a frequent recurrence to fundamental prin-

ciples is necessary," etc.; Washington that "the object of government is to protect and maintain individual rights," and that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." And several States have new constitutional provisions against "boards, or commissions, and other delegated bodies, which under pretense of administering to business, deprive the citizen of his common law rights." Nevertheless, in this last particular, the trend of our ordinary laws has been greatly the other way. Administrative law—what Lieber a hundred years ago called "Mandarin government"—is steadily growing.

But in their Constitutions we find only two provisions in the forty-eight States in forty years departing from these initial principles,—both in Oklahoma,—one restricting the abstract right of property to the "fruits of one's own labor" (and this was copied from the 1875 Constitutions of North Carolina and Missouri) and one declaring that "the right of the State to engage in any occupation or business for public purposes shall not be denied or prohibited, except that the State shall not engage in agriculture. . . ." This, of course, is socialism, saving individualism only to the farmers.

### 3. STATE INTERFERENCE

Democracy, as distinct from what John Adams and Fisher Ames termed *republican* (i. e., representative) government, was thought by both impossible, regarded even by Burke with trepidation, and our latest critic, Bernard Shaw, says, self-contradictorily, that "it has never been a complete reality . . . and has not been a success . . . if we did not despair of them [both capitalism and democracy] we should prove ourselves so worthless that there would be nothing left for the world

but to wait for the creation of a new race of beings.”\* Burke prophesies more diffidently :

“But the larger problem remains unsolved. Real power has been for too short a time anywhere in the hands of mere unbalanced numbers to allow of any judgment upon how that system will ultimately work and whether it can survive. It has already failed, temporarily or finally, in several countries. If it can succeed anywhere it will probably succeed in England, where the gradual and cautious temper which is the key to political success is indigenous.”†

And even Burke, with all the other prophets, did not envisage the tremendous civic and social changes that would result from democracy's making new laws, and not resting content with governing, and enforcing the old. It cannot be too often emphasized that the statute-making power did not begin to be realized and made use of before the latter part of the nineteenth century—so far as new and radical legislation was concerned.

But while our lawmaking by legislatures has been radical, that of the people (through the Constitutions which *they* make) has been conservative. In England, Parliament has been more radical than either. Continental legislation, while opportunist and restrained by no constitution, nevertheless reflects a certain inherited conservatism. It is necessary to devote many pages to such democratic legislation before coming to the constructive part of our study; but a cursory view of such laws is essential, if we are to understand our present stage of progress.

In both English-speaking countries the immense extension of state regulation and control, not only of state-created franchises or monopolies but of all “public utilities,” and finally even of ordinary trading corporations or even

\**The Intelligent Woman's Guide to Socialism and Capitalism*, pp. 452, 459. Shaw has never visited America.

†Quoted from *London Times* Literary Supplement, Jan. 10, 1929.

unincorporated businesses, all since the date of our original study, makes a vast field in itself, besides creating a great mechanism of administrative law and officers, foreign to the fundamental principles of common-law individualism, subject only to the ordinary court and jury when the rights of others were infringed. We have already had to mention the immense extension of state relief, old-age or non-employment pensions, compulsory insurance in all industries; this in England, while domestic matters, the conjugal relation, the custody and education of the family and the care of children have only in America become the subject of state control. And then with us the levying of taxes, Federal, State, and municipal, and the spending of the tax-won money, has been so vastly broadened, both in levy and distribution, as to create whole new areas of state activity; and still more recently, under the "fifty-fifty" laws, Acts of Congress to authorize our central government to enter upon spheres of activity not previously within its expressed power under the Constitution, the State being as it were bribed to acquiescence by the promise that half the money spent within each State shall be given by the central government. Thus a new governmental machinery, quasi-socialistic, is created, and breeds the corresponding governmental organism, be it Board, or Commission, or a whole new Federal and State Department.

The propriety of such aggrandizement if not usurpation of function under the American Federal Constitution, is not of course matter for this book; we are only concerned with what democracy *does*, not its internal right to do it under any particular country's government. But of our own country we must here pause to note how very much farther both State and nation might have progressed or experimented in radical legislation, were it not for our unique invention of a definite Constitution restraining the legislative branch as

well as the executive, and administered by a co-equal and impartial branch of the government. Not only have broad tendencies been checked (as, in the Federal Child-Labor Act, to make, through the taxation or the interstate power a new prerogative in the central government at the expense and to the disparagement of the States; or, as in the Shepard-Towner Maternity Act, of the people) by the decisions by our highest tribune of the people; but the mere knowledge of such a possibility (though doubtless encouraging legislatures, when composed of moral cowards, to rash and inconsiderate lawmaking) prevents many wild schemes from enactment and tends to keep even an uninstructed democracy within the bounds of sanity and a due respect of the "inalienable" rights.

Let us now take another cross-section of the stream of democracy's action, thirty years later, in 1925. How far has it carried out its promise of liberty, how far has it been reactionary, or retrogressed? Note that the fact that many of its experiments have old precedents, in mediæval legislation or old town-charters, does not vitiate our analysis of present tendencies; for every democratic prophet, or anti-autocratic revolutionist, from Paine or Rousseau to Bryan or Jefferson, has assumed that with the disappearance of rule from above, all restrictions on liberty would disappear. John Stuart Mill first noted the contrary tendency.\* That they were obnoxious to our own ancestors as early as the fourteenth century is shown vividly by the very wording of a statute of 1364 repealing one passed only the year before which was, perhaps, the most notable attempt in English lawmaking to invade individual lives: that

"That which was ordained at the last Parliament, of Living and of Apparel, and that no English Merchant should use but one Merchandise" be repealed, and "it is ordained,

\**On Liberty*, published in 1863; introductory chapter.

That all People shall be as free as they were before the said Ordinance," and "all Merchants, as well Aliens as Denizens, may sell and buy all Manner of Merchandise, and freely carry them out of the Realm" . . . thus establishing the great principles of freedom in living and in trade.

All statutes are of course limitations on a state of pure individualism, defining this latter word to mean a state of society recognizing personal liberty and private property and allowing all imaginable freedom of action and contract relating thereto, with only a judicature to protect such rights and an executive to enforce its decrees. The rights to life and liberty obviously belong to the same field; while even property rights will in many cases be found to run with liberty ones, notably, for instance, the earnings of labor, or the liberty of trade just traced back to 1364. Liberty rights are multifarious and indefinite; and our American courts have always wisely refused to narrow them by an attempted definition. But all possible organizations of human society, at least all that have hitherto been imagined, may be expressed by the words anarchism, individualism, or socialism, so far as they concern the liberty right, the free exercise of the individual will. Either one of these may exist either with or without the notion of private property, though of course one's actions as to property would be controlled under a system of socialism, and property itself would have no legal protection under anarchism.

We accept for a starting point of our study the personal liberty right as defined by these classic utterances of the times when modern democracy was born; that is to say, the right of a man to be free of external control in his action, thought, speech or writing, religion and domestic relations—these cardinal heads including residence, locomotion, freedom of labor or trade, education, absence of religious tests and established church, marriage, control of children—but

always only so long as his action, etc., is self-regardant, that is to say, does not injure others or transgress their corresponding rights or—except from the dryest individualistic point of view—do injury to the state. Or, let us rather say (as such individualists would insist that the word *state* was a supposititious abstraction) the welfare of the people at large. Such right to be protected by the common courts of law—in Anglo-Saxon countries also by a jury and the power to invoke witnesses and the right to be confronted by the accuser,—in brief, the rights guaranteed under the habeas corpus act and other criminal law safeguards; and the maintenance or protection of the individual in all these rights is (with the exception of defense against foreign invasion) the only proper function of the so-called “state.”

Property, although almost a necessary accompaniment of individual liberty under any system of civilization (even extreme socialists are compelled to admit a considerable amount of private ownership) we have, so far as possible, left out of the present chapter; though the ordinary mortal, when he thinks about his life, is thinking, ninety-nine times out of a hundred, of the property, the *living*, the possessions, he has got or may get in that life; and, when he passes judgment upon society or criticises his government, is just as often thinking only of how it affects his wages or possessions. Nevertheless it is possible to imagine a world of full individual liberty without the institution of property. Governments might exist, with the necessary amount of taxation in personal service—e. g., our old New England taxes of labor on the roads—the amount would need, with such a limited government, to be very small. Indeed our English ancestors far back, executing their own law, did without it entirely; the first “tax” ever imposed by government upon the people of England was for their defense against the Danes; the next (which shows the beginning of modern taxation for state,



i. e., general, purposes) for building bridges. And national defense still remains by far the greatest burden of our national taxation, though a large part of our State and local taxation is for general public purposes; that is, technically socialistic in principle. And in the United States, the whole of taxation, Federal, State, and municipal, already far exceeds, even without the war budget, that grievous burden of taxation of which both peasants and artisans complained at the time of the French Revolution.

Slavery, the condition of life-long bondage, is of course not recognized under the modern democracy; with us it was abolished in Massachusetts, Connecticut, and even, for the future, in Virginia, before the adoption of our Federal Constitution; but so also has it vanished in all civilized countries, democratic or otherwise. The fundamental liberty, freedom from servitude to others indefinite either in extent or time (for our courts have held that either condition of a labor contract makes for slavery) is taken for granted in all Christian countries, even autocracies—for Russia was only last, to our next to last, in this; and that, without a civil war. Indeed so extinct is it that the word is only used in metaphor—"wage-slavery," "white slavery," etc.—oblivious of the fact that the payment of a money wage was established in England, after Jack Cade's rebellion, as the very badge of freedom. Though the Athenian "democracy" was based upon slavery, modern democracy may pass its figure as an antique curiosity—and with more certainty than John Bunyan passed by those of Pope and Pagan.

The next simplest liberty of all, that of locomotion, travel or residence, was always restricted, regulated or even prohibited in autocratic countries. Yet it has been insisted on in English democracy by Parliament or the law-courts ever since the times of serfdom or the exaggerated sway of guilds. If a villein moved into a town, he became a freeman

after a year and one day. A man may live where he chooses, and move whither he will; under our Constitution the States may not even impose a tax on travel through them. Only passport restrictions remain to vex his journeying to other countries and at the return from other countries into this; these are, in theory, imposed to protect the people from foreign aggression, sedition or contamination. Only the Soviet government—no longer, by their own decree, to be called Russia—have gone back to the extreme of autocratic regulation, as when a monarch would order a man to leave the country or not, at his pleasure, or fix by command or *lettre de cachet* his place of residence.

But democracy, while retaining this liberty as to its own citizens, seems entirely willing to deny it to others; our exclusion of Chinese, now extended to Japanese, and of citizens of all “yellow and brown”\* countries except Mexicans and negroes, shows American democracy willing to go to the extreme in this; while the English have evidently no objection to it in principle, and France, the other great democracy, does not pretend to extend its own constitutional, still less the “natural” or cardinal individual rights, such as entrance and residence, in principle to others. We think it proper to exclude, for sanitary, moral, economic, or even political reasons, aliens; and, under our bureaucratic form of government now growing, to deny even to persons born here and hence claiming to be United States citizens the right to try their right to return to this country under due process of law, but leave this also to the pleasure of what the great Lieber (born a Prussian, but the greatest of all admirers of the American form of government) called a “Mandarin”—that is, a public official who is beyond or above the courts.

Liberty of the person, from arrest without due warrant

\*The racial colors of our country are “red, white, and black, not yellow or brown.” *Popular Lawmaking*, p 309.

and false imprisonment or detention without trial, with the right to trial by jury, is still guaranteed to us by the Great Charter and Habeas Corpus Act; the only dents in that armor so far have been the modes of imprisoning for contempt sentences, in labor disputes—existing at its worst forty years ago, and now in rapid process of reform by statute—the similar possibilities of the “padlock injunction”; and the startling legislation of some States permitting arrest or search without warrant, of the person who is suspected of carrying liquor (not however if merely suspected of a murder!) both arising from the hot-headed enthusiasm of those who would sacrifice all constitutional principles to the Eighteenth Amendment.

This cardinal principle of personal liberty—that no one shall be arrested, imprisoned, tried or punished without the constitutional safeguards—summed up in the phrase “due process of law,” including exemption from all military, martial, ecclesiastic, or administrative law as the last is known in continental countries—is best described under the phrase “the right to law,” and is peculiar to Anglo-Saxon democracies. I have endeavored to explain it fully in an unlegalistic way in other works.\* In these is shown how this elemental liberty right has been on the whole fairly preserved in the United States, save only for that vast growth of administrative, official, Board of Commission or Censor, “Mandarin” law, which is due to statutes creating boards or commissions with both legislative, executive, and even in practice, judicial, power over ordinary human businesses or activities. The growth of these, with the resulting centralization (which is however rather a political question undermining our Federal government and hence has no proper place in this book) is nevertheless quite the most portentous feature of American democracy.

\**The American Constitution*, New York, 1907, 1923.

We are now at last ready to take up the progress of the last thirty years in novel or radical legislation embodying some invasion of the cardinal liberty right, individual personal liberty, which was taken for granted as forever established by the Revolution in France and the evolution of English law down to and including the Declaration of Independence, the American Constitution and its first ten amendments. Such concrete examples are far more illuminating than the abstractions of philosophical treatises which, for want of them, appear profound when they are only abstract, escape criticism only because they submit no actual example to the test, and are above the reader's head only because not well thought out in the writer's.—Yet mark that this catalogue should not necessarily connote our disapproval; usually justifiable in end if not in means, the whole question of their justice, of their wisdom as well, "the ethics of their democracy," I leave for our consideration in the second, the constructive, part of this work.

We must begin by noting two lines of legislation which are reactionary: the peonage laws in the South, which aim at establishing a system of indefinite compulsory labor, that is, servitude; and the prohibition laws, now enshrined in a national constitutional amendment, which in one particular re-establish the sumptuary laws of the Middle Ages. True, they are imposed for a moral reason, the ancient laws (dress, diet, etc.) rather for an economic one; and they were a failure because they were found unenforceable or possibly because they were contrary to English common sense; such as the laws prescribing how many courses a man could have at dinner, how many buttons on his clothes, apparel being generally regulated according to the wearers' rank. The peonage laws were found necessary in the South to compel the negro agricultural laborer, or even the farmer on shares, to carry out his contract to work, particularly when seed,

fertilizer or supplies had been advanced on the strength of the same. But they infringed the great English liberty principle that the contract for personal service is unenforceable in its terms (that is, except by suit for damages) and, despite many ingenious devices—such, for instance, as the making it a misdemeanor to abandon work in such case—have repeatedly been declared unconstitutional in the Federal courts as counter to the Thirteenth Amendment forbidding slavery. The experiment of national prohibition is still in the making; it has been tried and abandoned in Russia and Scandinavia, partially so in Canada; probably never will be attempted in Latin countries, which have a curiously acute sense of personal dignity and freedom from state restraint in matters of private life, however subservient politically. But whether we approve or not, we must note that it is distinctly socialistic (as subordinating the individual will in things otherwise or previously lawful to the social well-being) and is, up to now, quite the most striking recurrence of modern free democracy to the ancient principle of state control—we may remember the life of Sparta, where one soup was compulsory on all.

There has been a great deal of lawmaking restricting the freedom of contract, liberty of trade, of labor; these are best treated under our chapters on Property and Labor, but must be noted here, as nearly all of them involve infringement of the broad personal liberty right; and some regulation or state recognition of Union labor, which falls best into our chapter on the right of association; and a few laws recognizing the benefits of profit-sharing which, though in no sense socialistic, will best fall perhaps into our chapter on that subject. But there are also many recent State statutes against boycotts, sympathetic strikes, and intimidation in labor disputes; these clearly fall into the class of laws protecting individual liberty or the right to labor and trade.

The fundamental liberty principle of the protection of the English freeman against military or martial law, standing armies, the billeting of soldiers, etc., has of course not been infringed. But new special legislation against mob violence, and against lynching has been found necessary; some of it however is by no means new to English liberty history; such as the laws of Ohio and some Southern States making towns or cities responsible in a definite sum to the kin of a man murdered by a mob; only that the early Anglo-Saxon law put the *weregild* on the neighbors or the kin of the enemy. The institution of the militia as the arm of liberty has been re-recognized in notable statutes of New York and other States forbidding any discrimination against a man because he serves in the militia, preventing penalties imposed by his employer for his absence for such service, and the labor unions from preventing it in any way, or passing by-laws against it or excluding from membership therefor (the fact that such by-laws are already unlawful under the common law does not take away the interest of such new statutes). Armed private guards have however been forbidden, in many States—but also there were mediæval English laws against “retainers.”

The right of freedom at elections, of voting, though rather a political one, may nevertheless be considered in representative democracies as a primal liberty right. Many laws have been passed to protect this, in Congress for, in the South against, the interest of the negro; in the North, for the factory employee. There has been a general decline in the belief in representative government, shown in the particularity of the new Western State constitutions, and in the mania for direct legislation and direct nomination—the initiative, referendum, abolition of the party convention. This, while a movement for greater, more absolute democracy, concerns rather its governance than its output. And the same phe-

nomenon is visible in many countries only recently democratic, if they can be called so at all—Spain, Italy, the Balkan countries, which prefer a plebiscite, even a dictator, to their legislature. Even more notable is the obvious trend of our own democracy to do away with the one restriction on itself—the American Constitution. But, while confident of itself, it has shown a marked tendency to shackle its representatives by vastly increasing in the State constitutions the number of subjects they are permitted to handle, limiting their sessions to one in four years, and the period to sixty or even thirty days! Yet (and this most curiously of all) the general tendency of the popular voting on such referendum or initiative laws has been on the whole conservative. The same phenomenon is noted of Switzerland, in Lowell's works. The direct election of national senators must also be mentioned as evidence of the steady current toward absolute rather than representative democracy. The problem of *advertisement* (of which later) prevents this from working well. It gives great advantage to the wealthy candidate who can afford to spend large sums in advertising, or even buying signatures for the nomination paper. Under the older system even a partisan machine was apt, other things being equal, to select a candidate likely to recommend himself to intelligent voters.

The great radical step of the last quarter century should of course be reserved for a special chapter: that concerning women and domestic relations,—though in a certain sense a distinct enlargement of liberty to half the human race.

Freedom of speech—a peculiarly American liberty, for in England it extended only to speech in parliament—and freedom of the press, asserted in all our constitutions, State or national,—has not been infringed, save somewhat in the direction of enlarging the definition of sedition, under the stress of the Great War, and, even before that, anarchistic

utterances or writings against established government and inciting to assassination or crime—due doubtless to the frequent attempts on the life of the President. There is an increasing tendency to protect people against newspaper libels, joined with a counter one to protect the papers from suits or punitive damages when retraction is made.

The great liberty right of the home—that a man's house is his castle—and to protect both him and it from search or invasion without specific warrant—part of which, the principle against search of a man's house under a general warrant, was first definitely and successfully asserted by James Otis in Boston, in one of the disputes with the King's officers which led to the American Revolution, causing the great Chatham to declare in Parliament,

“Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a wall? No. It may be a straw-built hut; the wind may whistle around it; the rain may enter it, but the King can not”—

has nevertheless been seriously invaded in the Volstead Act or legislation, both State and Federal, consequent thereon.

Another great liberty right of England, that against self-incrimination by compulsory testimony in a criminal case, has been extended by American democracy to include all testimony given in any manner under compulsion of government, in a civil proceeding, or even when there is no proceeding in court at all, as testimony given before a congressional commission or extorted by a government Board or officer in any manner whatsoever, e. g., evidence, in an income tax return, of income earned by “bootlegging” cannot be used as a basis for prosecution of the taxpayer.

Religious rights—first established in the absolute by American democracy, not yet in England, and at first, as it were, only negatively in France, but later denied in full freedom



to Catholics,—have not been touched by late American legislation since the Constitution definitely proclaimed them, unless such be considered the forbidding, by State laws, of the reading of the Bible or the teaching of evolution in the public schools.

The right to education is nowhere claimed by our democracy as a natural right, but is, in a few, declared a political one. Nearly all States by their constitutions require free schools. Some States, for reasons of "Americanization," are beginning to bar or limit the instruction in them of foreign languages, as well as to require all parents to send their children to them; which, however, our Supreme Court has (1925) declared to be an invasion of the general liberty right. But all parents may be compelled to send their children to some school, and the American State assumes some right to supervise their instruction.

Other general liberty rights—the right to bear arms, against standing armies (that is, both in England and with us, the legislative branch maintains full control over them by annual or biennial appropriation of the money for their support), against military law, the right of petition (rather a political right) and of assembly, have not at all been infringed but did not need extension. And if there remain any cardinal liberty rights whose discussion we have omitted in this review, the same may be said of them. Only the great racial question of liberty—social or political equality between the races, black, white or yellow,—we have foreborne to touch upon—and this because it is a problem peculiar, in general, to American democracy. Where it has touched the British (in South Africa, British Columbia, etc.) it has generally been handled in the same way. It may be broadly stated that Anglo-Saxon democracy concedes in theory political equality (but possibly only up to the point where it may still exercise political control) but not social; the French

are more liberal in the latter respect, partly, perhaps, because they are not yet faced with a political problem.

Finally, American democracy (not the English, still less the French) has shown a vast increase in criminal laws, tending to make numbers of actions crimes, or at least misdemeanors, which were not so before. For criminal law affords the most fertile field for the investigation of democracy's handling of individual liberty questions, as it will embody the most direct invasion of ordinary human rights to personal liberty, to a man's conduct in life (both self-regardant and otherwise), to his labor and living, acquiring and using property, marriage and all sexual or parental relations, education, amusements, thought, opinion and religion. It gives the doctrine of state control its handiest tool: for, by declaring an action previously allowable a crime, all social changes may be wrought. "Can Congress declare the ownership of a glass of whiskey a crime?" queried Justice Holmes, before the Eighteenth Amendment. In matters of criminal procedure, the ordinary constitutional guarantees of the Right to Law as before explained, protecting the citizen against arbitrary arrest or imprisonment, and requiring jury trial and punishment under a law previously existing, have still been fully preserved; only that provision of our inherited freedom requiring all prosecutions to be by indictment, by a grand jury, and not by private information or government prosecution—so that a man could only be accused of crime by 23 and convicted thereof by 12 of his fellow men—has been generally done away with in the Western States (which have a large foreign population and were possibly less versed in our legal history) and by the growing practice of placing prosecutions, especially when Federal, in the hands of the government directly, through Boards, like the Interstate Commerce Commission or Federal Trade Commission, or even one supreme officer like the single Federal Corporation

Commissioner, created under the Roosevelt administration, but since superseded by a non-partisan Board. But the danger of leaving all prosecutions for crime to the initiative of a government officer was well shown by the recent municipal history of Boston, where the elective district attorney, in conspiracy with the colleague of a neighboring county and some members of the bar, entered into a system of organized blackmail for private profit, whereby the prosecution of criminals or innocent was used but as a threat for the extortion of money, and a large part of Boston (with the possible exception of the criminal classes themselves) experienced a sort of reign of terror of denouncement before the criminal courts, less sanguinary but otherwise quite of a kind with that of the French Revolution.

Otherwise, the safeguards of the criminal have been only too well preserved, partly by confused legislation and court procedure, but mainly by moral cowardice in the judges, unscrupulous lawyers, and an over-sentimental view of the outside public, affecting judges and juries as well. This, again, seems to be peculiar to American democracy; nothing corresponding to it is seen in England, or, save in political trials or *crimes passionnels*, in France. It is as difficult for a heinous criminal to get punished in most States, certainly capitally, as for a rich man to enter the kingdom of heaven. But the number of criminal laws establishing new offences—even crimes—has multiplied by thousands. For every one person hanged or imprisoned, or even convicted and fined, there are probably quite ten thousand laws or ordinances hanging over his head, and this, omitting the immense number affecting a man's motion, diet, or residence, arising from the new institutions of the automobile and prohibition and city or town building-regulations.

The right to move about the world freely, and to work or not as he will, is dear to the philosophic anarchist; yet

we find a general increase of vagrancy laws which crudely brand him as a tramp. The carrying of arms, concealed weapons, sale of revolvers, etc., is usually forbidden, and the law is effective against law-abiding citizens, who are thereby deprived of all defence against robbery under arms. On the other hand, the militia, "the natural defence of a free people," and the right or duty to serve therein, is protected by new statutes aimed against efforts, whether of employers or labor unions, to prevent such service or to punish employees or others for it.

Love without marriage, which Christianity made a sin, democracy has made a crime. It has been humorously but profoundly said that the first grand elevation of the sex in history took place when the Christian Church ordained that they were instruments, not merely of pagan pleasure, but to damn the souls of men. But in this matter democracy, in all countries, has acted contradictorily. While the first of modern governments to make of adultery, even fornication, a crime, it has compensated by encouraging what the Church made likewise a sin, divorce. Wisely in this matter it has protected children; even to the point of raising the age when a girl's intelligent consent to sexual intercourse is deemed legally possible, to 16, 18, or even 21. But though a woman may not in law consent under that age, she may in fact; and the boy of 14, her seducer (or seducee), may be sent to jail for life or in some States hanged. Thus in several cases more than one man has successively been convicted for rape, under such laws, upon the *same woman*—though all probability would seem against it. If she neither time consented, she was singularly unfortunate. Sexual intercourse between a negro and a white woman is always presumed to be rape by the unwritten law; but it is also in many States made a statutory crime; so, in many, marriage between the two races (a negro being usually defined to be a person with 1-16 or 1-32 of

African blood, but in Virginia by a law of 1923 any trace whatever, though 1-16 Indian blood is allowed) or with a Malay or Mongolian (and our law, much to their disgust, has defined this word to include the Japanese) is forbidden, often to the point of declaring it a felony.

Abortion under the common law was always criminal, even to the degree of murder, in either party committing or consenting to it; we have made it criminal to advise it, or to advertise it or the cure of venereal diseases or the procuring of divorces by lawyers. The more radical States are beginning to pass laws for the compulsory sterilization of men or women, but only those detained in State institutions for the insane or epileptic (not in ordinary jails) nor yet as a punishment for criminals, except that in California a man committing carnal abuse of a female under ten may also be punished by castration in addition to imprisonment. "Pandering," in a Southern State has been made a crime and defined by statute; and the wife made a competent witness against the husband, in such case.

There has been some tendency to make fraud or breach of contract intended, or after part performance, criminal (as mentioned above in the peonage laws). More surprisingly a beginning of legislative effort to compel telling the truth, at least in matters of brands, business labels and newspaper advertising; it is a misdemeanor in South Carolina and Virginia to include in advertising matters statements which are deceptive or misleading or intentionally untrue. The "blue-sky" laws, framed to protect the public against fraud or false statement by company promoters or persons floating security issues, have become general throughout the country.

Laws against lobbying or bribery of legislators, with corrupt practice acts to prevent the use of money, etc., in securing either a nomination or an election, have been almost universally adopted, particularly since the system of direct nomi-

nation went into effect. And many States have tried to carry the same prohibition into private life by making criminal the taking or offering of tips or gratuities, or commissions or other advantages, by agents empowered to make contracts for others. It has been made criminal to sell goods at different prices in divers localities, other than as justified by transportation rates, but probably such a law would be unconstitutional except as to corporations.

There has been a distinct tendency to further protect the right to reputation. Besides the laws mentioned protecting one against newspaper libels, Kentucky has taken the lead in a law making it unlawful to repeat or scatter false rumors or reports of a scandalous or harmful nature, which may be detrimental to the character or standing of any other person, whether a private citizen or candidate for or holder of office.

The Great War naturally brought on a large number of statutes, for the most part Federal, dangerously infringing on the constitutional rights of personal liberty and free speech, punishing revolutionary or even pacifist propaganda, industrial or political violence, criminal syndicalism and sabotage, discouragement of enlistment or other utterances calculated to weaken the nation in the war. Under the maxim *salus populi suprema lex*, they were held constitutional under the "war power" (which however by previous decisions of our Supreme Court has no constitutional sanction) and would only be notable therefore as showing that democracy in time of war is quite as indifferent to all ordinary juristic doctrine as any autocracy; but they have tended somewhat to overlap into the present times of peace. Thus, the Oregon Act recites that "there is an active element within this State which is determined if possible to overthrow our existing political structures" and "destroy our *industrial and economic institutions!*"—Washington State not only punishes sabotage, but makes it a felony to interfere with or supplant the

owner's management of his industry, or to threaten such interference. Minnesota had an act against sedition or opposition to the United States government (which was sustained by a divided court in the case against persons who by their utterances had sought to discourage the purchase of Liberty bonds) or concerning the military forces of the United States when at war; so the sedition law in Pennsylvania. Nebraska made it criminal to hold public meetings save in English. The exhibition of the red flag was punished by fifteen years' imprisonment in New Jersey or thirty days' in South Dakota. And then followed a great many "Americanization" laws, still continuing, for the teaching of English only, in public or other schools, specifically forbidding instruction in German, with other more reasonable legislation for instruction in English and American history, the United States Constitution, etc. The legislation in 1918, in all States, was almost entirely devoted to such war affairs.

Passing timorously by the field covered by the Eighteenth Amendment and consequent legislation, and also that of restriction of immigration (which is not after all a natural right, but a matter always recognized as within the legitimate control of any nation, whatever its government) and labor and trade regulation which shall properly fall into their respective chapters, we only note invasion of personal freedom in the very important matter of marriage, and the beginning of it in education, and lately, perhaps in a negative assertion, in the matter of established religion. The matter of miscegenation has been mentioned; but there is apparent a definite tendency to State control of all marriage, at present only reaching the stage of requiring examination (even by compulsory bodily search) as to physical, sexual, and mental (even inherited) sanity, but which later may well go to economic and character fitness (marriage is already forbidden by State statutes, to habitual drunkards). Eugenics is to-

day regarded as a possible subject for State consideration even in those States which ban the teaching of evolution. Marriage may be forbidden to the scrofulous, epileptic or feeble-minded. Several States provide for the compulsory sterilization of inmates of State institutions with hereditary mental disability, insanity or feeble-mindedness. We may perhaps look forward to a time when the propagation of families like the famous Jukes may be stopped; and the government may copy the Austrian court's prohibition of marriage with one not having sixty-four quarterings of nobility—that is to say, sixty-four immediate ancestors free from syphilis, mental inadequacy, African blood, or perhaps even criminal record. But even the Virginia statute does not seem to care, the moment that both parties have two—or thirty—or in whatever other Mendelian proportion the bride and groom are related. Finally, the question of birth-control—obviously one which the State cannot reach—is being taken up, by legislation against its propaganda.

The early tendency in the United States was to greatly facilitate the procedure and indefinitely enlarge the reasons for divorce. The French democracy had preceded us by an even looser law. The English, owing to their social system, for a long time lagged behind. But of recent years there has been a distinct eddy backward in our States; the number of causes has been diminished, and the procedure and residence restrictions strengthened. Yet, owing to the fact that a judgment of divorce legally granted in one State—or even in a foreign country—must be recognized in all others, such reactionary efforts to stem the tide are futile. New York, Massachusetts, and a few other States have declared by recent statutes that they will refuse to recognize the divorce of their own citizens who go temporarily to other States or countries solely for that purpose; yet the familiar procession of Paris divorces would seem to show either that the parties



disregard such laws for their own actions, leaving results to the unhappy children, or care not for the ultimate validity of a decree so long as it remains good for a dinner-party; a familiar example of the rule we so often insist upon, that custom is stronger than any statute. But a glance at other democracies, Sweden and Norway for instance, confirms our early impression that democracy tends to easy and frequent divorce, even to the point of taking the extreme secular position that marriage is but a civil contract dissoluble at any time by consent of the parties. Mr. Bryan and the fundamentalists have not yet attacked the divorce of man, busied solely with his descent; it is left for the Roman and Anglican churches to hold to the Christian view that marriage is a sacrament, its result a status not a contract, unalterable, like the relation between parent and child.

But the parental power is distinctly controlled and restricted by our American democracy. Not only is the sanitary and moral condition of the home carefully inquired into, but the education of the children as well. And we begin to find laws for taking them from the control of their parents and placing them not only in State institutions or schools but with other private families—most wise laws, it would seem to those who believe in the homebred rather than the institutionalized child. And very generally, upon report of some board, society or commission, children may be removed from the parents' control, not only as to their education but their custody. Illegitimate children are usually capable of inheritance from the mother, but in some States from the father, equally with the legitimate children, indicating the beginning of a trend to do away with legal distinction between the two classes; but here the *recherche de la paternité* would appear to interpose an insuperable difficulty. Though the attempt to invade parental control by compelling all chil-

dren to attend State (public) schools was checked by the Supreme Court at its beginning, that to proscribe the teaching of evolutionary doctrine therein is still *sub judice*; although American democracy had followed French, in secularizing state instruction by prohibiting the use of the Bible in them.

Coming finally to the root question of organized society—its defence—whether, granting to its full the classic conception of the rights of man, he is, as citizen, subject to compulsory military service—only those individualists who take the dry logical extreme that the state, as such, is a morbid growth, would deny the obligation to defend it in time of war, at least from foreign aggression. These would rely, in the last extremity, on a voluntary levy *en masse*. Yet their school persisted, at least in English countries, down to the Great War: up to the time that it was actually done, a majority of the Liberal party in England believed and proclaimed that conscription was impossible and unconstitutional; and in our country that school was outspoken to the point of incurring punishment as criminal, right through the War. Some limited their objection to military service outside the country—unconsciously reasserting the old common law of England—but the extreme pacifist, like the extreme individualist, made no such distinction. But it is generally agreed, even in the pending treaty renouncing war, that “aggression” may be martially resisted; and it makes little practical difference whether it is the people or the state who do so.

#### 4. COMPARISONS OF TIMES AND COUNTRIES

Not, after all, a very portentous increase in the infringement of the personal liberty rights is shown in this study of the last thirty years. And it is noteworthy that such as there

has been is mainly caused by moral motives, or the urge for social reform. In England, there has been far less; but just because this moral urge is distinctly a sentiment of the great middle class, and has not there grown to government circles; also, they are socially more conservative, while politically and economically less so; this we shall find strikingly shown in their far greater invasion of fundamental property rights. But the most noteworthy difference between the American democratic stream and that of continental countries, particularly Germany, is that there these invasions, restrictions, denials, of individual liberty rights—pausing also to remind the reader that they, under their system of government-privileged administrative law, have never known personal liberty as Anglo-Saxons understand it—are always imposed in the interest of the state, the Reich, hardly at all as with us in the interest of special suffering classes, the poor, the uneducated, the unskilled, the weaker in efficiency or race or sex. The very protection to working women given by the laws requiring proper rest and vacation at the period of child-bearing, where alone they have outprogressed us, are given frankly for motives of the health of the state, rather than of the persons directly concerned. The increasing privilege conceded in all countries to organized as distinct from agricultural or unskilled labor, is not so much due anywhere to democracy as to the power of association of the organized guilds, in modern parlance, “trade-unions,” which were born in the Middle Ages, even under the feudal system, and grew under governments absolutely autocratic, until democracy itself abolished them, at the French Revolution.

This moral tone seems peculiar to American democracy, and is not so universally found in England, Australia or even Canada; the prohibition laws of the last (which, as in Norway, have now disappeared) were based rather on police reasons or revenue needs than the intention to debar men from

liquor; the latter, moral purpose, is more apparent in the present dispensatory system.

Let us take a specimen year of our American legislation and consider it in some detail. A good year for that purpose will be 1908, the last year of the progressive Roosevelt administration, and the last year for which we possess the invaluable report of the New York State Library, which with infinite pains and skill they compiled annually for thirty-eight years and then, unhappily for the sociologist, were compelled to abandon. The subject-headings even of this legislation are instructive. Of these, six were given to the form and publication of the statutes in the several States,—a matter of more importance than it might seem, when we remember that the State of Georgia discovered that its Constitution had never been printed officially, and in Arkansas all the statutes were printed and published by a private concern, as a business venture. One of these headings covers the unification of such State statutes throughout the States by their voluntary action—a most important and useful movement, not only for its practical advantages but as a protection of the States and the people against centralization, too much interference and control from the bureaucratic government at Washington, justifying the continuance of the fundamental ideas of local self-government on which, after all, English and American liberty mainly rests. Initiated in 1891, this reform has grown like a rolling snowball; yet, although officially established by the laws of the several States, its national annual congresses being thus official bodies, the difficulty in our country, especially in politics, of what I have later called the advertisement problem, is well shown in that President Taft, upon his inauguration in 1909, though it had been successfully functioning twenty years, with over forty States taking part, including his own State, and had brought about the passage of many uniform

laws already—notably on such important subjects as deeds, evidence, negotiable paper, marriage and divorce,—though a lawyer himself, had never heard of it.

Forty-three headings we find devoted to the State constitutions and their amendments. The hypertrophy of the written constitution, both as controlling or setting bounds to democracy and as dictating its activities—usually futile in the long run—is elsewhere considered; it is significant here as showing the people's care for their own liberties or institutions and their unwillingness even to trust their own representatives with them, as is further shown by the rapid spread of the referendum. Of course the written or rigid constitution is an American invention, and no necessary part of democracy as a scheme of government.

Criminal law has 22 headings, of which 7 concern procedure—here the only startling innovation is that in Oklahoma the jury may, and on request of the convict must, fix the punishment in criminal cases—9 headings relate to punishment—here our tendency is to leniency, the reformative rather than the retributive or even the protective theory of government, loose systems of parole and pardon, diminution of imprisonment terms for good behavior, and the sentence of juvenile offenders to reform schools rather than prisons—and the remaining 6 defining or specifying new crimes. These and the corresponding sections in other years afford the matter we are now considering.

Civil law (as distinct from criminal) takes up 58 headings, of which 20 are concerned with the administration of justice in the courts, 5 with corporations, 1 with trusts or monopolies, 5 with contracts, leaving 18 for property rights, 7 for family relations, and 1 for torts or civil injuries; the last three only afford matter for our study, and the last two for this chapter.

Turning therefore to torts, we find in 1908 nothing to

enlarge or to restrict individual liberty upon this point; only the reaffirmance of a principle archaic in our common law that the descendants, family, and also the *widow* recover damages from those at fault for a person's wrongful death.

The inhibitions of the prohibition movement, increasing all this time in the Southern States, were flooded like a child's sandcastle before the tidal wave of the Eighteenth Amendment, but before that, showed an increasing tendency of democracy to control men's mode of living; though other sumptuary laws common in the Middle Ages have been adopted not at all. As showing how intimately our democracy (such measures would not be possible in the Old World) will concern itself with a man's personal conduct, we note laws making it criminal to give a drink (we follow the American custom in restricting the use of this verb to the drinking of alcoholic beverages, and enlarging that of "rum" to include wine and beer as well as distilled spirits) except in one's home, "for social purposes"; to take a drink on a railway train, to give a free lunch in a saloon, "except with only pretzel, cheese or crackers"; to make, sell, or even smoke cigarettes. No one however will criticise the legislation, now universal up to the League of Nations even, for state prohibition or control of traffic in the modern more dangerous drugs as well as the older opiates.

The matter of boards of health covers many laws, and that of vital (birth, death and marriage) certificates or statistics. How far such laws unduly restrict curative practice and discovery we must leave to specialists and the readers of *Arrowsmith*, as well as the fifty or more concerning the practice of the various schools of medicine; homœopathy, osteopathy, "eclecticism" have been duly recognized by laws, though not yet Christian Science, at least as to criminal liability for the results of its practice. California has shown its catholicity by establishing a State Medical Board

composed of five regulars, two homœopaths, two osteopaths, and two eclectics—thus the old order gives place to the new.

There is much legislation against the adulteration of food and drugs; in one year we find laws concerning milk and its products, cereals, starches, bread, rice-flour, meat with preservatives, grape juice with benzoic admixture, sugars, syrups, confectionery, cider. Cold-storage enterprises and canneries are being regulated, at first inadequately; the economic charm of mass-production and elation from new discoveries in cold-storage and chemical embalming processes as applied to food have caused people to forget that it is impossible to make always and permanently wholesome the flesh of animals long dead, canned garden-stuff, fruit, preserves or even pickles. And the political pull of the great packers enables them to increase and multiply without earnest legislative check, even at the risk of national indigestion or ptomaine poisoning. The American housewife has learned to buy ready-made dishes, salads or hash as well as pastry or ice-creams, delicatessen, canned goods in general; and her children are rapidly forgetting what most savages early learned, that meat or vegetables, fish and fruit, should all be eaten fresh.

On the other hand we find much legislation concerning paper drinking-cups, napkins (such laws add many new wares which the ultimate consumer is compelled to buy of the manufacturer), towels in hotels, the length of their sheets; only in municipal ordinances, as to the length of girls' stockings. Spitting, in public places, is quite generally made an offence, except, in one State, where hotels are required to furnish spittoons. On the other hand, there is as yet no law aimed to prevent the contagion of the common cold.

The final result is that the study of the last forty years more than confirms our conclusions of 1886. While governmental democracy has been fully attained, it is proving quite

as indifferent—more so, in what concerns the individual, his life, his activity—as any mediæval or autocratic government, to the broad principles of human liberty which it was supposed for all time to secure. Take the very beginning of the Declaration of the Rights of Man (24th of June, 1793) which began the Revolution :

“The French people, convinced that oblivion and contempt of the natural rights of man are the only causes of calamities in the world, has resolved to explain these sacred and inalienable rights. . . .

“It accordingly makes, in the presence of the Highest Being, the following declaration of the rights of man and of the citizens :

“1. The object of society is the general welfare. Government is instituted to insure to man the free use of his natural and inalienable rights.

“3. These rights are equality, liberty, security, property.”

Then follow 32 other articles, for the most part based on our Declaration of Independence, the American or Virginian State Constitution, or even Magna Carta itself ; but among them note :

“9. Law must protect the general and the individual liberty against the oppression of those who govern.

“6. Freedom is the power by which man can do what does not interfere with the rights of another.

“17. No kind of occupation, employment and trade can be prohibited to citizens.”

This document was really but a Bill of Rights ; but in the formal Constitution of the French Republic adopted the same day,

“122. The constitution guarantees to all Frenchmen equality, liberty, security, property, . . . the free exercise of religion, general instruction, public assistance, absolute liberty of the press, the right of petition, the right to hold popular assemblies, and the enjoyment of all the rights of man.”



Yet Dr. Lieber from whose book on "Civil Liberty" I take the translation, closes his chapter with these words:

"—the severest lesson taught by the first half of the nineteenth century is, perhaps, that absolute democracy has no connection with liberty."

Dr. Lieber wrote these words in 1857, in reference evidently to the French democracy; for we were in the strict-constructive period of our history when we were ruled by the South and before the radical wave that followed our Civil War Amendments and the discovery by our democracy of its full legislative power. But who shall deny their truth to-day, particularly in matters of moral improvement or strong organized prejudice?

Dr. Lieber goes on, in his plea for institutional (constitutional) government, to point out:

"Large, unarticulated masses are swayed by temporary opinions or passions . . . it requires but a certain skill to seize upon the proper moment . . . [to destroy] by one sudden vote, all power and liberty, not only for their own lifetime, but for future generations." (P. 387.)

Now the problem of American democracy is most portentous in one thing—size. The United States is immensely larger, has far more people, and these more approaching a common standard or culture, than any other democracy ancient or even modern. The former, as we have seen, were never more than city-states; the modern—France—is steeped in the tradition of private liberty, even to the point of not paying direct taxes; while the Swiss are a people of four nations, kept separate as to all their internal institutions, and far more heterogeneous in their conservatism than we (surprising as the statement may sound to our "Americanization" friends) in our general radicalism; the one quality which the "melting-pot" most quickly imparts to such few

"Nordics" as may arrive without it. And our size alters the problem qualitatively. Centralization is possible in a small country without loss of liberty; for they still have local self-government, control by the people of their own affairs. It is not possible in a nation the size of the United States without loss of liberty, personal, individual, economic or social; and in the end political liberty would vanish with the others.

Books have been written upon this matter. To develop it further here would be but to write another. I shall take the position therefore as axiomatic.\*

The other menace to keeping our democracy free may be

\*Our dangers in centralization have been emphasized by almost every publicist save Hamilton, from Jefferson to Senator Borah, Republican as well as Democratic (in modern parlance), Federal or Republican (in the old). They have escaped no profound thinker; Lieber, the Prussian, is as strong in his denunciation as Jefferson; only de Tocqueville, a Frenchman from ever-centralized France, thinks it inevitable:

"Among men who have lived free long before they became equal, the tendencies derived from free institutions combat, to a certain extent, the propensities superinduced by the principle of equality; and although the central power may increase its privileges among such a people, the private members of such a community will never entirely forfeit their independence. . . . I am of opinion that in the democratic ages which are opening upon us, individual independence and local liberties will ever be the result of artificial contrivance; that centralization will be the natural form of government. A democratic people is not only led by its own tastes to centralize its government, but the passions of all the men by whom it is governed constantly urge it in the same direction. It may easily be foreseen that almost all the able and ambitious members of a democratic community will labor without ceasing to extend the powers of government, because they all hope at some time or other to wield those powers. It is a waste of time to attempt to prove to them that centralization may be injurious to the state, since they are centralizing for their own benefit. Among the public men of democracies there are hardly any but men of great disinterestedness or extreme mediocrity who seek to oppose the centralization of government: the former are scarce, the latter powerless."—*Democracy in America*, Book IV, chap. III, end and footnote. Chap. IV: "The lot of Americans is singular: they have derived from the aristocracy of England the notion of private rights and the taste for local freedom; and they have been able to retain both the one and the other. . . . The concentration of power and the subjection of individuals will increase among democratic nations, not only in the same proportion as their equality, but in the same proportion as their ignorance. . . ." (*Ibid.*)

An excellent collection of the earlier pronouncements on this subject may be found in Charles Warren's *History of the Supreme Court of the United States*. And perhaps the author may be permitted to refer to his *Constitution of the United States as It Protects Private Rights*, where this matter is particularly treated.

ticketed by the convenient word, bureaucracy,—what Lieber called “Mandarin government.” This we shall consider in a later chapter, on democracy’s administration of government; the effect upon personal liberty (as well as upon property, labor or trade) rights of having human activities generally submitted to the control, not of courts or definite, previously defined written laws, but of bureaus, commissions, boards, created *ad hoc*, whose judgment is the judgment of three individuals, or even one, in fact and on facts unreviewable by any court.\*

Perhaps all these matters may be admitted as proper subjects for the control of administrative law—and many of the following; but we cannot hope our list (based, since the New York State Library gave up its annual digest, on the necessarily concise reports to the American Bar Association) has been complete; and moreover, we have not included “temporary boards, officers, commissions” which may hopefully come to an end (though a witty congressman was once heard to declare in Congress, while regretfully following his party’s lead in voting for such an appropriation, that he “had witnessed the birth of many such a Federal board or commission, but never gone to the funeral of any”) when their work is done. Boards or Commissions created in the States or Federal government from 1908 to 1925 comprised:

Agriculture, live-stock, cotton mills; taxation matters; veterinary surgery; sanitary matters; health of those about to marry; quarantine; historical monuments; archives and history; pharmacy; poison and narcotics; alcoholic liquors; peddlers and commercial travellers; geology and soil study; mapmaking; medi-

\*The portentous increase of such governmental agencies, all of which, in their ultimate analysis, depend on the will or prejudice of an individual official uncontrolled by precedent other than his own, may be vividly shown by enumerating the number and the purposes of such boards, commissions, commissioners, or censors created throughout the United States in the last few years. In one year (1907) they numbered 262; their functions in that year included

cine; doctors and physicians; optometry, homoeopathy and osteopathy; eclectic practice; dentistry; bacteriology; undertaking and embalming; shaving and haircutting; midwives; sheep health; admission to the bar and attorneys; mining, mines and miners; engineering; public works; State printing; entomology and plant diseases; sale of insecticides; geological and topographical surveying; parole of criminals, pardons, and probation; indeterminate sentences; industrial workshops or schools; arbitration of trade or labor disputes; State banks and banking; building and loan associations; civil service, appointments and reform of; insurance, fire, life, liability, automobile, etc.; prison labor; accountancy and auditing; female factory inspectors; pensions; wharves and docks; electric omnibuses and trucks; nurses; industrial, evening, and summer schools; textbooks; roads and highways; weights and measures; grain and cereals, inspection, grading and weighing of, and trading in; warehouses and warehouse receipts; elevators; pure food; pure drugs; legislation, uniformity of; legislation, comparative, and reference department; the Nancy Hanks Lincoln burying ground; State or local libraries; armories; boiler inspection; forestry, State, private, and town; fire protection; bees and apiaries; investment of public funds; stallion registration; boards of visitors to all public, and many private, institutions; land drainage; poultry and dairy matters; horticulture; arboriculture; inspection generally of mines, workshops, factories, stores, hotels, schools, halls, clubs, or generally any places (except, but for the building inspection, churches) where two or three may be gathered together; publicity and advertising; ditto, of the State or its resources; movie pictures; censorship of films; of plays; charities; public labor; vital statistics; weather bureaus, employment bureaus; navigation and pilots; port wardens; harbors; fish and oysters; elections and voting; automobiles; dissection; vivisection.

All these things were in those years, in State or nation, taken by legislation from individual action or private enter-

the execution, regulation, or control of railroads, steamship companies, all common carriers, transportation companies, terminal companies; telephone and telegraph, gas, water, heating, lighting, power companies, or public service generally; city building and health and poor commissions; education and the public schools; jails, asylums, and almshouses; fish and game; immigration (into a State); corporations in general; all special kinds of plumbers; blacksmiths; building and loan associations; hotels; sweatshops; epileptic colonies; horseracing.

prise and common-law control and placed permanently under the administration, or in some cases the regulation and jurisdiction, of Boards or Commissioners. And his or their determination is practically conclusive upon all individual right; for even when these statutes provide an appeal to a court (as, in our country, they always must) the Board's finding on the facts is rarely disturbed (indeed the Supreme Court of the United States has in effect declared it final) and it is always the *facts* alone that are in question in such cases. It may be argued that it is better to have the facts determined by a trained official or a Board or Commission familiar with the subject than to intrust them to a jury ignorant of such matters. The former however is the European system of administrative law, to which therefore our democracy seems to be reverting, as against the old English common-law idea, which our ancestors were at such pains to re-establish as against Roman prelate or Norman king. Which is the better, it is not for us yet to decide. But the tendency is increasing; since 1907, we find many new fields invaded. Of course such Commissions take away authority otherwise reposed in the Executive, and relieve him of responsibility; a Board is impersonal, and usually unattackable; and the commissioners themselves (as we saw above in the case of nurses) breed other Commissions to inspect themselves. But they all give salaries, and clothe some one with a little brief authority.

The French democracy again remains as the outstanding example of the possibility of such things side by side with personal liberty; but we can only repeat that on the one hand the French have a vast tradition and usage of individual liberty, while on the other, they have never enjoyed a system of common law, jealous of any other, and of a thousand-year-old civilization where no king nor state can touch a man in his liberty (but only a grand jury of his peers), invade his

home without judicial review, or hold or condemn him or his property without open court trial; nor finally punish him unless twelve men concur.

There is no doubt, therefore, we must seriously conclude, that democracy, to-day, has lost its ideal of personal liberty, and definitely accepted the principle of Control. When its eye is fixed upon a popular end it forgets all theories, mentions "personal liberty" but in derision, and reverts in all things to the classic age of the city-state, to the control even over private life or personal human relations exercised by the ancient city as described by Fustel de Coulanges, but made a world wider and a world more dangerous here by the fact that our democracy's sway is over half a continent, and the islands of the sea, white, yellow and black, tropic and pole, Mexican and Yankee, and the lever of that power suddenly entrusted to women as well as men, alive, alert, eager of control, immigrants as well as old citizens, educated or not, but all sharing one enthusiasm—to impose the right as they see the right, even to the point of standardization, and by imperial ukase broadcasted from Washington throughout the land, regardless of differences of belief or condition and of past history.

Only two great exceptions may be noted in this general new democratic tendency to revert to the stern control of the classic city-state—modern democracy has abolished slavery and has permanently safeguarded a man's religious belief—though not so much, recent events would seem to show, his liberty in scientific or political thinking.

France, except for its restrictions on the church, has followed the same course, but with a government always, even under the Empire, far more solicitous of local or private or individual right; England too has definitely—perhaps one

should rather say unconsciously—adopted the principle of state control, but with a tradition, resembling the French, of private rights; property alone excepted, in which their democracy is more reckless than our own. Belgium, while radical as to labor matters, is conservative as to the church; Spain, alone of Western countries, owing mainly to indifference to any government and to the proud persistence of provincial right—it is in spirit the least centralized of any modern country—has lagged behind.

However much we recognize the reason of such laws of control, in this chapter summarized (the *reason*, not the *value*, for the value of mere conduct without free will is nil in the ethics of democracy), there are some which lead us, and their very number should lead us, to answer the question posed by this chapter, in the negative. We are still, perhaps, in the greatest essentials—life, and freedom from personal restraint—free. But no candid mind can arise from the perusal of those twelve hundred laws, passed in two years in our democracy, without the desire to call attention if not to cry a warning note. For there is no worth of character except it be freely attained. Liberty is the condition of conduct, as truth is the one great virtue of the mind. On the day you take from a man his liberty, says Plato, you take half—one might say, all—his other virtues. As far as we can dimly see the Cause that strains through things, the condition of this world is infinite opportunity, infinite temptation, infinite possibility; the principle, at least of human life, is voluntary improvement by conscious selection. The prayer says, *Lead us not into temptation*,—not, remove it from the world. And democracy, of all rules, should ever remember that it was for liberty, and by liberty, that all its deeds were done.

## CHAPTER III

### LABOR

All property, except of land, is derived from labor; even land also, in the Norman feudal theory,—from the labor of conquest; as all the New World was held as in ownership by discovery; but under Teutonic custom all land was and is allodial, when not held in common and hence not the subject of private ownership at all. Moreover, even under the feudal system, the ownership of land entails duties—the duty of protection, the duty of nurture, be the inhabitant serf or villein—while the ownership of personal property, before Marxian ideas, does not. This, therefore, the most absolute, *personal* kind of property, is well called *personal*. Even the notion of taxing it is modern: when the king extorted money from the Jews he hardly pretended to any constitutional authority. But property in land rests on a different reason, was always less absolute, and requires a different treatment. To a society in the hunting stage, it is not necessary, even impracticable: the American Indian, though acutely conscious of his tribal ownership of a more or less well defined territory, never held land in severalty; even when planted, his ownership extended but to his crop of maize or yams. In the pastoral stage it is little different; only in the agricultural stage does separate property begin; and even then much land might be held in common, all, perhaps, as in the Russian village, though the moment it is assigned in severalty, even for one year, the institution of property begins. But it is quite possible to conceive of the highest imaginable civilization without private ownership of land. Henry George would burden it with all the taxes; or



the occupier of any lot for farm, home, store or factory, might have to pay a rent to the town or state; all without detriment or disintegration of what we term civilization, even as it now is. But the same is not true of personalty, for—whatever socialistic vision we may cherish of the future—the rise and growth of civilization has always been, and now everywhere in the world is, coincident with and dependent on the common respect and legal guaranty and protection of a man's individual ownership of his tools, raw materials (when garnered or mined), and the products, even the surplus products, of his labor.

One must not be misled by the fact that legal recognition of landed property in Anglo-Norman civilization seems to precede that of personalty. There is but one mention of the latter in Magna Carta, against several concerning land; and, both in bulk and antiquity the written laws about land, English, French, Spanish or German, exceed those anent personal property. But, in the first place, there were few subjects of personal property in early Teutonic society—cattle the principal, possibly a man's weapons and clothes; but these, with the products of his chase, he held by his good right hand and so, secondly, formal laws about such were unnecessary. Thirdly, if there be any notion that can be called innate, it is the idea of property. The Johns Hopkins studies confirm our common observation that almost the very first idea that children have—and they share it with all savages—is that of their personal and private belongings. And this extends not only to tangible objects, but to things intangible, such as a seat at a table, a place in bed, or even rank in a procession. Most animals—certainly dogs—also manifest this sense. Far from being an invented scheme of robbery as Prudhon would have it, it is a deep-seated concept of human, even of animal, nature. There has never been any objection to a man's holding what he found, hunted, or got

by his labor—until, in far later days, the coming of the tribal chief and the capital levy in its primitive form; so the earliest law we have is the unwritten law that a man may forcibly defend it, and be in his right. Before any court came, he executed his own law; and the earliest juries, courts, in our own racial history, were convened to try but the question whether, when homicide resulted, he was “within his law” in killing the thief or aggressor. If not, the tribal protection was withdrawn, and he became “outlaw”—any one might molest him, despoil him; he became, to use a vivid contemporary illustration, like bootleg whiskey.

The question whether property in land or personal property preceded is therefore somewhat academic. As a juridical institution, possibly the former; as elementary unwritten law, custom, probably the latter. A law of the King of Wessex, Ine, A. D. 690, recognizes personal property as a matter of course: for it punished “theft” and the concealing of a thief. Obviously there can be no thievery without property.

It is probably also true that the institution now most commonly attacked and undermined by recent legislation, first in England, now in both our States and the Federal government—inheritance or testamentary disposition of personal property—is practically equally old. Obviously, what a man had, and was protected by tribal government in having, he could and would hand over to his son, while living; the step was easy to a nuncupative will. So now; and we therefore legislate against gifts in anticipation of death. And modern democracy is beginning to question heritable wealth in general.

We conclude that the logical order is also, at least in non-feudal countries, the historical; labor precedes property; so we take up democracy’s handling of the labor question first. But the subject is far more complex than that of property, as

liberty is a wider concept than ownership. Although labor makes capital, and capital makes wider the scope of labor, each as it were resulting in the other—unless property is created only to be consumed, which apparently is what the extreme anticapitalist wants—the study of all human activities, even of those which are economic only, is greater and wider than the simple two questions of the ownership and use of commodities. “Labor is not a commodity”—a pregnant phrase which the late Samuel Gompers worked his whole lifetime to get into our written law.

But now, by “labor”—the most frequently used word of modern democratic politics—we mean only one definite kind: not work of a man for himself, nor of serf or slave or villein, but work for a money wage paid by a personal (i. e., not the state) employer; and furthermore, only manual work, at that, not intellectual or even clerical. To Wat Tyler in 1383 is due the establishment of the great principle that a money wage is the test of free labor, and that all men should be free to labor at what trade they would, in all the towns—this indeed was provided in Henry’s Magna Carta, but not as to agricultural villeins—and that even, as we have said, an agricultural laborer (and these new principles brought about the abolition of villeinage, serfdom, by an easier way than ours nearly six centuries later), a slave or villein, once in a town and working for wage at a trade, became *thereby* free after one year and one day. So also, the ownership of land made a freeman—a principle we carried into our law for Indians under the Dawes Act, five centuries later—this also bringing the vote, as in England, at least since the Conquest, the privilege of voting belonged only to landowners. But a laborer receiving a money wage was *for that very reason* declared a free man from Wat Tyler’s time; it remained for our twentieth century to orate about “wage-slavery.”

England, for eight centuries after the Conquest, remained

a representative oligarchy. Parliament or Crown, it was always class rule; conjoined however with that marvellous regard for the fundamental rights of free men peculiar to that country, shown in all her constitutional documents from Magna Carta to the Bill of Rights, and finally in our own great written constitution which embodies them all and more, and of which quite half the bulk is given to the rights of the individual man, not only against other men but against his own government. But the industrial, still less the agricultural, laborer, though guarded in his "natural rights of man" and of freedom of trade and labor almost to the point aimed at in the French Revolutionary declaration, was not of the ruling class; and his economic interests were not considered. The long series of "Statutes of Laborers," from 1349 through the "Great Statute" of Elizabeth (1562) down to the present time, had for its original object the compelling of labor (in so far as it could constitutionally be done, like the peonage acts of our Southern States), the discouragement of tramps and vagrants, and the fixing of wages not in the interest of the laborer but of the employer; maximum wages were fixed, minimum wages never; indeed a penalty was imposed upon either the employer or employee up to the time of Henry VIII, thereafter on the laborer only, for taking or paying more wages than the statute prescribed. Later statutes to a considerable extent treated of the laborer's welfare, so far as food, rest hours, apprentices, were concerned; but never prescribed either wages or hours of labor, save to put the one so low and the other so long as to show that they were enacted solely in the master's interest. It was only in the nineteenth century that laws for the protection of the laborer alone were passed. Combinations of labor (strikes, unions, boycotts) were watched and legislated against from earliest times. The first reported boycott case dates as far back as 1221; the first legislation

against labor unions from 1360; the first against strikes from 1349. Agricultural labor, always the favorite of England up to the nineteenth-century repeal of corn-laws, was specially fostered by a law of 1405 forbidding children to go to any other trade than husbandry after the age of 12; nor could any parent bind his child apprentice to learn a trade unless himself a man of substance, owning landed property. They sought to keep unskilled labor "in its place"—on the land—and the mass of England agricultural—"her fields green and her cheeks red," as Ruskin urged later. And even the guild rules were in the interest of the worshipful masters, not the journeymen. And of course strikes to raise wages became a criminal conspiracy the moment that wages were set by law; but then even the individual laborer was punished criminally if he left his job before completion—a law which most of our Southern States are seeking to reestablish.

The earliest English law touching the labor question, enacted just after the Black Death, required all persons under sixty "to do labor to such persons as require labor," at the wages existing before the plague, or else be committed to jail; and no workman or servant could depart before the time agreed upon—but the Commons did not join in this statute and it was probably illegal; but a year later (1350) the Commons joined in amending it, providing an elaborate scale of fixed wages for all hand trades and for farm laborers and servants. This statute was confirmed in 1360 by a law expressly permitting work by contract, and declaring void "all alliances and covins between masons, carpenters, and guilds, chapters and ordinances." Laborers refusing to work might be imprisoned, and punished if they moved to another county. This law was not expressly repealed until 1869! But already in 1377 came the last statute recognizing villeinage, and villeins fleeing to cities were made free, as we

said above. In 1388 laborers were restricted to their hundred, and after twelve, had to follow the father's trade; leaving employment, they had to have a testimonial, and none could employ them without such letter. In 1427 wages were to be fixed by justices, the attempts to fix them by law having failed. Many wage-fixing laws followed, all repealed by the great statute of 5 Elizabeth. The use of the injunction against labor started in Jack Cade's rebellion, 1452. In 1562 the Great Statute of Laborers, a full code, but diametrically opposed to our modern ideas: all persons not having an estate of 40 shillings a year were compelled to serve in any of the enumerated handicrafts at the request of any person using an art or mystery; all persons between 12 and 60 in husbandry; none to leave under a year's time, nor the town or city without a testimonial; unmarried women between 12 and 40 to serve in like manner; wages fixed by a justice of the peace; none to use a manual art without apprenticeship; and masters prohibited from discharging servants before their term or without reasonable cause.

This brief sketch of the past is necessary if we would fully comprehend the strides that our democracy has made in the matter of labor legislation. First and foremost, it has transferred the question from one of the master's advantage to one of the protection and even profit of the employee. We have possibly gone to the other extreme. The unexpected weakness of our democracy is its slipping back to the mediæval idea of control and its belief in the efficacy of lawmaking. It seems possessed with the idea that statutes can amend both nature and human nature. The State legislatures even more than Congress have erred in this particular, and the error has not been confined, or mainly confined, to either political party. And there is no class in the community so well organized, politically speaking, as that of industrial labor; that is, there is no large body of voters (except per-

haps now the women) so ready to demand and so able to effect legislation. As a consequence, no other field of our experimenting affords such an interest to the student of sociology. Quite singularly we have here got down to first principles; and those basic propositions which usually appear as mere generalities in the bills of rights of the State constitutions and our first ten national Amendments, or even those of the Declaration itself, are now actually discussed in our courts as they are called upon to test statutes which seek to control the whole of our citizens for the benefit of a part. Through our earnest desire to ameliorate the condition of the mechanic or handicraftsman, we are in danger of reviving mediæval restrictions, refurbishing musty contrivances of old guilds, trade mysteries, or paternal city government, to suit the immediate purpose of the more thoughtless leaders of the many. And as the United States is the only nation which has a Constitution to serve as a buckler for protecting the "natural rights," and is also, more broadly than even Australia or New Zealand, the most radical experimenter in labor and economic affairs, we may confine this chapter to the study of our own progress, though, in property concerns, Great Britain has gone farther than have we.

It results from the essential, fundamental nature of this movement that no other branch of our lawmaking has been so much questioned upon constitutional grounds. The Bill of Rights being our highest law, our courts in applying it to the current wave of labor legislation have had to discuss first principles which had hardly been thought of since they lay in the minds of Jefferson or Adams, Bushrod Washington or Marshall. Our legislatures, impatient of human experience, particularly that of other nations or older times, growing always more sensitive to the immediate vote of their constituents and less truly representative in the older sense (and this is true of other countries than the United

States), make laws carelessly, not invoking even their individual judgment as to their own State constitutions, feeling that they can be corrected by the courts if they err. As a consequence, these have had to do an amount of destructive work by no means contemplated by our constitutions. It was commonly said to the Founders by those who opposed reposing this power in the courts that Congress, or even the State legislatures (then thought more radical) would never pass an unconstitutional law. But if this power of annulling legislation (by no means always) is disagreeable to the men who enact the laws, it is certainly far more so to the judges. They use the power most reluctantly; yet its exercise at all has led to the present wave of resentment with the judicial branch which threatens to disrupt our very fabric of government.

The last two pages are taken almost textually from this chapter as it appeared originally in the *Atlantic Monthly* for November, 1897. There followed a study of the labor legislation for the ten years preceding. One thousand five hundred and thirty-nine labor laws had been enacted in all the States and Territories and by the Federal government, many of them whole codes in bulk, but confined to only a few general subjects or principles, to efforts in a few particular directions to regulate human relations, in still fewer to punish interference with them.

It then pointed out that the broad difficulty with this sort of legislation, which had compelled courts to reject it, was that such statutes were restrictive of human liberty, of the right of a private citizen to use his own faculties or personal powers or possessions in such way as he would, provided only he did not injure others, and to be protected by the state in so doing. It should surprise us now, and would have surprised our forefathers, or Paine or Jefferson or other prophets of democracy, that this is the direction in which our legislatures most often err. Yet all history shows,



contemporary Europe as well, that a democracy suddenly intrusted with sovereign power betrays a distinct inclination to tyrannize,—of course, for the general good.

The only department in which the science of legislation is progressive to-day, perhaps the only one where it can be without revolution, is in what we may call sociology, concerning human relations and material well-being. But it is apt to forget great principles in petty or particular improvements. Therefore it is not discouraging, but shows rather our democracy's vitality, that of these 1,639 legislative experiments 114 were found impossible under the Constitution, State or national, more usually the State. On the other hand we should therefore feel no resentment against the courts, more than when a gardener prunes a tree. And of the forty-three different principles, or lines of action, which one could analyze in this mass of laws, the constitutionality of no less than twenty-three was by one or more courts denied or doubted. Yet at first sight they, for the most part, were neither strange nor new in the world's legal history, rarely subversive. The largest class by far was made up of the detailed laws regulating the sanitary condition of factories, etc., the propriety of which had been established in England, though against great opposition, some sixty years before, and the constitutionality of which was never questioned in this country; then the mass of statutory regulations aimed at the preservation of the health or morals of factory and store or workshop or even private tenements where outside labor is employed—the last only has been questioned constitutionally. We found in the ten years 146 chapters of such legislation, factory and shop, and of mines' regulations almost as many—65 chapters in 33 States—only one of which was held unconstitutional, a statute of Pennsylvania compelling the employment of a State inspector by a mining company or mine-owner and the making it or him liable to

his operatives for damages caused by such inspector's negligence.

Labor, as organized politically, was never much interested in such matters; they were left to philanthropists and the Consumers' League, instituted to further such amelioration of conditions by a sort of "white boycott"—the publication and circulation of, not an "unfair" but a fair list, of such firms or concerns as followed the standard set by the League. "Labor" was interested primarily in working hours, pay, and monopolization of the employment. It was not thought possible, either constitutionally or economically, to control rates of pay, at least until very recently. But State control of the hours of labor was early secured. Although, since the repeal of the old English statutes above mentioned, it has been felt to be unconstitutional in England, and is expressly so in the United States, to make it criminal or penal to employ or use the labor of a man over 21 in ordinary occupations, where no special danger to the health or safety of the public is involved, there was an early decision in the Massachusetts Supreme Court in a case hardly noticed at the time and imperfectly argued, that such restriction of hours might be imposed on women, though of full age, in mills, and of course on children; and as they compose the great bulk of labor employed in textile mills, it indirectly affected the employment of men. It is impossible, in cotton mills, to employ the small number of adult males, after all others have been dismissed.

The matter led to great confusion in the public mind. When people speak of eight or nine hour laws, they are still usually talking generally of such laws which only apply, still, to factory or other congested forms of industrial—or machine-shop, railway or mining—labor; not to store, or shop, or agricultural or domestic or individual service (though in New Zealand and Australia the state can fix the hours of

these) ; and only then of women and children, save in hazardous or unsanitary occupations, as above excepted, or in public work, where the state determines hours (or even wages) in its capacity as employer, not lawmaker ; so the United States government, under its interstate commerce power, as to railroad employees.

But under the recent trend of our democracy, to give to women all rights, personal or economic as well as political, now fixed in our Constitution, there is of course the question whether woman's labor can be restricted in any manner not imposed upon her male competitor. It looks now as if the courts would settle on the attitude that her health may be protected, but not her purse nor her morals : laws requiring the same wage may be void (except of course in public employment, as in other wage regulations) or laws forbidding to her night-work—or even occupations likely to lead to immorality?—while hours of labor, vacations after childbirth, etc., may be by the state enforced.

And as to men, while the bald principle is still in the textbooks, that the time of work of a free man may not be limited by law, nor his wages fixed or right to contract controlled, *in ordinary occupations*, the list of occupations not considered "ordinary," or which are held subject to some public interest of health or safety, is being so extended that soon the exception will become the rule.

Only two States have hitherto made any effort to prohibit *all* men from working for as many hours as they choose to contract for—Nebraska and Colorado ; and in Nebraska they did not actually prohibit labor over the prescribed time, but merely said that it must be paid for at double rates ; and the law did not apply to farm or agricultural labor. In Colorado the movement did not even get so far as a statute ; the legislature inquired of the State Supreme Court, as they had a constitutional right to do, whether a bill which provided

that "eight hours shall constitute a day's work for all classes of mechanics, working men, or laborers employed in any occupation in the State of Colorado," was unconstitutional; also if an amendment limiting the law to laborers employed in mines, factories and smelting works, would render it so, —and the court replied that in neither form was it constitutional—holding that it was not competent for the legislature to single out certain industries and impose upon them restrictions from which men otherwise engaged were exempt; also, that the proposed law violated the rights of parties to make their own contracts,—“a right guaranteed by our Bill of Rights, and protected by the Fourteenth Amendment to the Constitution of the United States.” The Supreme Court of Illinois also pronounced against laws limiting the hours of labor of adult citizens, male or female. Georgia was the only State which said anything about hours of labor in general; but as the statute of that industrious community limited the length of the working day to the time between sunrise and sunset, it went unchallenged, though it would doubtless be unconstitutional as to industries requiring nocturnal occupation. These cases put a quietus in the United States on any attempt to limit by law in general the time that a grown man may labor. Of course, such is peculiarly a function of the trades unions; and they fully avail themselves of it. In the absence of a special contract, the State may indeed prescribe what shall be a working day, as it may any other weight or measure, at least save as to indefinite service, a farm laborer's, domestic's, or sailor's. Yet such a law was held unconstitutional in Ohio, where it applied to the employees of a railroad or mine only and merely required double pay for overtime above the ten hours it fixed; and inferentially so in Nebraska and Illinois, the court saying that “statutes may, and they sometimes are, held to be unconstitutional, although they contravene no express word of

the Constitution, as where they strike at the inalienable rights of the citizen so as to infringe the spirit of the instrument, though not its letter"—a generality which harks back to the wording of the French and Jeffersonian Declaration of the Rights of Man, going perhaps somewhat to justify the prejudice of those radical assailants of our Constitution who would take away from all courts the power to interpret or vindicate constitutional right.

Public labor—for the State, cities, towns, or even contractors therefor—may have its hours limited and its wages fixed by law, constitutionally, yet even here our courts have shown reluctance to make the infringement of such legislation a crime; and otherwise it is of no practical effect where the employer and employee are in agreement. And here may be placed that very pertinent question, already mentioned, which was put without reply by Mr. Justice Holmes of the United States Supreme Court,—how far should, in all democratic countries, or could, in those which have a constitution protecting natural rights, a legislature or parliament declare actions crimes which are not *mala in se*? The learned Justice instanced the possession of a glass of whiskey—such legislation has however since been passed and sustained as constitutional under the new Amendment; but it would seem as if there must be a reasonable limit to such things. Anyhow, the courts of California with some indignation refused validity to that part of the statute which made it a crime for the employer even to permit his workmen to work overtime, and similarly in New York. But, as the extreme upholders of prohibition argue, if you don't make it a crime, the statute becomes a dead letter. It therefore becomes almost a psychological question: how much of control of life and social or trade activities the modern occidental man—and woman—will bear. Probably she more than he; but he may be subdued by her.

There was a time, not very long since, when, with the discovery of electricity and its practical applications it was hoped largely to do away with the factory system, its dangers and abuses; when it was dreamed that with a thread of power introduced into every home from some waterfall, the woman might work her loom, the man his wheel or lathe, in his own home; in view of this the late Edward Atkinson used to propose the question whether under any law the State could invade her home to interfere, whether she chose to work eight hours or twelve. But obviously, most great modern industries cannot be conducted alone, in one's own castle. Therefore, democracy has fully established its intention, as well as its right even in constitutional countries, to regulate and control labor in all but simple trades, and even in those (as by license to plumbers, doctors, druggists, engineers, and a hundred other trades or professions) where the public health, safety, or even welfare or convenience (?) is concerned. And when the Supreme Court of Illinois held void any legislation which restricted, or even protected, women and did not apply to men, saying, "male and female created He them," it was possibly out of step with modern progressive ideas; though we may not be certain until we see what fate awaits a constitutional amendment now pending, sponsored by the official woman's party, to remove all distinction whatever between the sexes in any matter whatever, industrial, social, economic or moral, concerning property, liberty or personal relations.

The next greatest mass of legislation was on prison labor; in which the general tendency of our legislation was to prohibit all productive prison labor entirely,—certainly all employment the product of which can be sold in the general outside market in competition with free labor. The more conservative States do not go that length, but content themselves with merely regulating prison labor, or providing that

it shall be directed so far as possible to occupations which do not compete with the main industries of the State in question. Yet every State or Territory has legislation on this matter, and there are no less than seven State constitutions which embody it. Its wisdom is questionable. Ruskin urged that the hard, disagreeable labor of the world (such as mining, underground work generally, forging iron, rude toil on public improvements) should be done by the criminal classes alone, to the relief of those who have not offended against the social state. We have convict camps or road-working convicts in Southern States, and the reader who is interested in such things may find a very curious work called *The American Siberia*, wherein the commissioner of convicts in the State of Florida relates his experiences of many years with such camps; but it may be doubted whether the lot of the convict in the roughest of them is so harassing to the nerves or debasing to the character as that of an unemployed prisoner in an ordinary jail. It seems a sad criticism on our industrial state that the number of convicts should be so great as to give freemen cause to complain of the competition of their labor. Yet Ohio, and other States have attempted to prevent—by laws usually held unconstitutional as interfering with interstate commerce, a jurisdiction of the Federal government—the importation of convict-made goods from other States into the State, and a bill is now (1929) pending in Congress to that effect. However, it may be well enough that convict labor should be primarily used on public works; and there would seem even to be no objection to their use in building State roads, dikes, dams, waterways for power, cutting canals or improving harbors, where there is little private competition, if they are managed in such manner as not to make a disagreeable spectacle in the streets. A bill of this sort was proposed in Massachusetts, to build the Cape Cod canal, a public work desired for three cen-

turies, but which did not financially repay the private enterprise which finally accomplished the building of it with hired labor.

Woman's labor will be further considered in a special chapter; but it may be wise to note here that several States have enacted, or proposed, laws requiring her wages to be the same as man's, at least in public employment. And many States are adopting "minimum wage laws" in certain industries, applying to women only, and not public service; these latter are however, in Massachusetts and other States, merely recommendatory, not mandatory, that is, they are fixed by a State commission after a hearing and depend for their enforcement merely on publicity and public opinion; when compulsory, they have been held void by the United States Supreme Court. Probably equal wages in private employment could not be compelled without an amendment to the constitution, State or national, if meant to be compulsory throughout the country; one such is now pending; but the proposed similar amendment to make Federal regulation of child labor throughout the country was decisively defeated. This proposed "Woman" amendment would establish broadly that all political, property, industrial or even social rights (i. e., marriage, children, etc.) should be identical with those of men—just as the Fourteenth Amendment sought to do for negroes. This part of the latter amendment was successfully evaded, and is now a dead letter. Such would probably not be the case with the Woman's Party amendment; though conceivable cases might arise—military service, to take the obvious, or social matters, promiscuous lodging in camps or cars, or criminal, such as the law of seduction or rape—where to carry the theory to its logical extent would have peculiar consequences. So, in California, an ordinance of the city of San Francisco that no women should be employed to serve liquor in bars or cafés was held unconstitutional; other



States have adopted like laws, and in Louisiana it was sustained. This question is now academic; yet waitresses in all-night dance-halls might fall under the reason of the law. Many States have adopted statutes forbidding female, or young female, telegraph messengers or newsvenders—not however, barbers, manicures or masseuses—all such, except perhaps as to minor girls, would go down before the proposed amendment. Yet several States have already adopted it into their State constitutions. In England even, long since, reformers put a stop to women working in coal mines, where they worked stripped to the waist—most of our mining States now prohibit female labor there. All such laws would go. Yet our highest court, as shown in its minimum wage opinion, still in part clings to the theory, “takes judicial notice,” that a woman is not the same as a man; “male and female created He them,” though the Supreme Court of California would have it otherwise.

Our country has been a wonderful field for economic or social experiment, due to its existence as forty-eight States, each in most important matters autonomous. An experiment could be tried in one and pushed to its conclusion without injury to the others; on the contrary, to their great profit by the example. It was like a ship with forty-eight water-tight bulkheads: leakage or corruption in one could be limited to it and probably cured without endangering the whole ship of State. The counter figure of course is that an infection, a blunder, in one may not be cured even by joint desire of the other forty-seven; but it does not hold, for there is always the extreme measure of a national constitutional amendment, even were not in most cases the force of enlightened public opinion quite sufficient. Thus, the labor interests have affected even some amelioration in the labor legislation of the South. Only in the most intimate matters of marriage and the home, where conditions, tradition, even religious consid-

erations, differ, has voluntary uniformity of legislation proved impossible; even there, as in the case of the Federal income tax and prohibition, the major surgery of a Federal constitutional amendment may be resorted to. Boards to bring about such uniformity, created by law in all the States, have now been laboring for more than forty years and will be able to bring about such uniformity of law in all cases where it is desirable. But this digression is on a matter after all peculiar to the American democracy; all other modern democracies have centralized governments; though the British "Empire" has approached a condition of federation like our own,—save of course as to war and foreign relations; indeed it is, strangely enough (except for having no control upon its legislature) in a condition much more nearly approaching that of an American republic as intended by Jefferson, than we have grown to be. The States of the British Empire, with the exception of India and the Crown Colonies, are autonomous; our States, as against any constitutional amendment, are not. "The indestructible Union of indestructible States" has in the latter part of the dogma proved delusive.

Sweatshop legislation has become general at least in the Eastern or industrial States. Sanitary restrictions applying to a house or room where others than the family are employed are more easily explained under the "police power" than where only the family works, in its own home; it may include a greater number of workers in one room and yet the constitutional sanctity of the home applies. Yet we may probably predict that the police-power will end by entering a man's house, "though the King may not," as is already seen to be the case with prohibition enforcement.

The most surprising direction in which our labor leaders have secured legislation is that of bringing in the State to regulate the labor contract itself, and the strengthening of

restrictive unions and combinations by permissive or protective statutes. The whole labor history of the past, in France as well as England, may be summed up in the emancipation of the individual freeman from the guild as well as from the state, of the trader from restraints of trade, of the town merchant from the chartered companies. The economic history of enlightened countries consists in the throwing down of all barriers by which laborers were excluded from the labor market; in the wiping out of the interminable and vexatious regulations and restrictions which hampered trade as between man and man, between country and town, between the privileged member of a guild and the ordinary freeman. There should be a proverb, "as short as the memory of an agitator"; for it was as late as August 4, 1789 that this reform was accomplished in France under the tocsin of the Revolution; while in England, owing to the greater liberty citizens had previously enjoyed, its completion took place some fifty years later. A French historian speaks of "the glorious night of the 4th of August, which made good the demands of the laboring classes for the freedom of individuals as against absolutism, and for the abstinence from every encroachment by a *positive economic legislation upon free economic life*." It took a millennium to bring this about; but apparently a century has sufficed to turn the labor unions against it—are they, in the long run, right? We are beginning to hear to-day of "the tyranny of unions"—complaints from the underpaid yet overcrowded clerical or legal callings—clerks, accountants, teachers, lawyers—that they cannot get into the well-paid trades, or at least, apprentice their children in them.

Now, as constitutions speak primarily for freedom,—freedom of the man against the many to-day, as formerly freedom of the many against the man,—it is not surprising to find this kind of progress backward condemned by the

courts the most often of all our crude attempts at outworn solution of perduring problems.

One State in the Union (Massachusetts) has created for itself an entire chapter of legislation upon the labor contract, which is for the most part valid; other States and Congresses have fussed over it in detail with striking results. The great protection of the laborer in the five centuries past has been that the English common law has always refused to enforce specifically the labor contract, alone of all contracts between man and man—that is, no person can be compelled to carry out a contract for personal service, though he is liable in damages for refusal to do so—a privilege and advantage of laborers which the zeal of our people against “trusts” came perilously near making them lose: under statutes, especially Federal, which attempted to check combinations against trade, and particularly interstate commerce, and which place extraordinary duties upon already overburdened chancellors, the laboring man was placed in some danger of being compelled to work under penalty of a criminal nature,—a position as disagreeable to him as it is, at least since the time of the early Henrys, novel. Then the abolition of slavery has made it a supposed requisite for some Southern States to get some control over their labor by reenacting ancient servile laws, as, for instance, that a farm laborer who breaks his contract before its term, or obtains advances of supplies, fertilizers, etc., on a contract for farming on shares which he does not carry out, shall not only forfeit wages due, but be liable to a fine or penalty which may be enforced criminally. Here again the Constitution has been invoked to sustain a liberty right, this time without complaint from labor leaders. Freedom of contract, both as to a man’s labor and his property, was originally regarded as almost the most important of liberty rights, ranking perhaps immediately after the right to liberty of one’s person and the inviolability

of the home. But it is evident that the labor interests, as organized in American and English democracy at least, would completely dispense with it. Although our courts have always held that it was protected by our constitutions, as resulting both from the right to property and the right of labor, there is no other principle so frequently infringed by our legislatures. And the Supreme Court of the United States has consistently declined carrying the constitutional protection to its absolute limit, holding in somewhat vague language that there is no absolute right of free contract when the public welfare demands its restriction in a concrete case. Rather surprisingly, the State courts have proved far more conservative, that is, have applied the free contract doctrine more ruthlessly, than the Federal. To pick a few salient examples:

Ten laws, in nine States, provided that when an employer requires from an employee a day's or a week's or a month's notice of quitting employment, he may not discharge the employee, although drunk or incompetent, without giving him corresponding notice or payment of wages for the full time, even when the employee has given written consent to such an arrangement; up to 1907 three State supreme courts had declared such laws unconstitutional. Ohio and Massachusetts forbade the withholding of weavers' wages or imposing fines for bad work, and penalties for damage to machinery and tools; the Massachusetts court at first held this unconstitutional, and the law was slightly modified.

Then there are the numerous laws prescribing the time, money, and nature of payment of the workman by his employer. There has hardly been a more prolific cause of strikes in recent years, except for the actual raising of wages and against the employment of non-union men or the trading with non-union concerns, than the insistence of railroads or other corporations (of course even now our laws dare

not attack the freedom of contract of the individual employer in this particular) upon their right to pay a skilled workman higher wages than a bungler, or one who has much to do more than an employee of the same class who has little. Thus the railroads have been with difficulty staving off for years a demand on the part of the railroad unions that a station-master in Aroostook county, Me., for instance, should be paid the same wage as one of an important station of the New York Central. But union labor is intolerant of excellence; it seeks an average. President Eliot has pointed out that until it alters this attitude, there is little hope of improvement. It is also impatient of all payment which is reckoned, not upon the number of days' or hours' labor, but on the value of its output. Piece-work it detests, and would do away with it wherever possible. Mining companies, in particular, have evoked its resistance on this point from their desire to pay the miner for the weight of coal his day's work has actually turned out at the pit's mouth. There was doubtless some cheating in the rejecting of coal or ore under the plea that it was not up to standard. In 1907 there were thirteen States which had passed laws forbidding payment by weight of coal or ore, or providing that it should be weighed before being screened or sifted or appraised, usually with a system of State inspection, at the employer's expense, so that the parties could not evade these provisions even by voluntary contract; the courts of four of these States expressly "annulled" these statutes, and by implication in eight others, leaving only one where the law was not held unconstitutional. The attempt of the Pennsylvania anthracite coal miners to have their employers compelled to pay their union dues out of their wages was the principal cause of the coal strike of 1926.

As to the time when, or the currency in which, an employer shall pay, the legislation is endless; weekly, fortnight-

ly or monthly, and in cash, not in checks, store credits or goods. Here one may not so much mind the infringement of the constitutional principle, but of common sense. The inconvenience of requiring an employer to pay everybody—his chauffeur or his trusted clerk—by the week rather than the month may be disregarded. But the danger of departing from liberty principles may be well shown in two or three actual instances: in the panic of 1893 in Chicago, the great employers of that city found themselves absolutely without cash, and hundreds of thousands of workmen and women were in danger of starving; for even if the mills and workshops were kept open, wages could not be paid in money. As a benevolent act, a number of employers got together, and at a mass meeting of the operatives announced, amid cheers, that the danger of closing the shops had been averted, and that money enough had been obtained to insure the payment of wages—fifty per cent in cash, and fifty per cent in checks or orders which were as good as cash—and the wage-earners went home happy,—only to find on the next morning that the wise legislature which represented them had made any such arrangement between master and workman a criminal compact, for which the former was liable to fine and even imprisonment. The law was then repealed, and the Illinois courts found it unconstitutional, but after the damage was done. In fourteen States where such legislation existed the courts held it void. But we must again remind the reader that for our purposes in studying the tendencies of democracy, laws passed, though held void under our peculiar constitution, are even more instructive than less radical ones. And among the three States whose courts sustained such a law was Massachusetts; and to-day murders and robbery under arms of bank-messengers are frequent there, and the Boston newspapers are pointing out that it is because of the existence of this very law, forbid-

ding employers to pay labor in checks, so that their weekly payroll has to be carted through the streets in dollar bills.

That maintenance of general stores by corporations, particularly mining, at which employees are compelled or even invited to trade should be forbidden by statute, seems reasonable in view of well-known abuses; yet many State courts held this impossible under the principle of liberty to trade. Even the compulsory living in improved houses, model dwellings, built by the employer for the operatives, excites the animosity of labor interests, as does the establishment by the employer of pension or insurance funds to which they are compelled to contribute; this last has been actually forbidden by statute, and in some States even when the employees contribute voluntarily, but three out of four States having such legislation found through their own courts that it was unconstitutional.

So our history shows that the establishment of a judicial branch of government as a check upon the legislative has worked well. The courts have by no means proved reactionary, as the labor interests are too ready to think, save only where their assigned duty has been to protect those very human rights for which our democracy was avowedly formed. In most important matters, they have been distinctly progressive; quite abreast with the best democratic thought of the time, quite ready to conform the words of the Constitution to new conditions. At the beginning, the great reforms legalizing trade unions and removing strikes from the law of criminal conspiracy were brought about in our country by decisions of the courts, not by legislation, as later in England. Under the early common law as it lasted up to the nineteenth century trades unions were illegal; so even strikes if for the purpose of raising wages, but this was set right in the United States soon after the Revolution; and the courts have done all they could to further modern en-



lightened opinion that the best way to handle labor disputes is to recognize both sides in the law, and gain reasonable adjustment of difficulties, as well as the honest carrying out of such adjustment when made, by the establishment of responsible bodies of organized labor duly chartered under State statutes. Almost every State of the Union has now such laws chartering Knights of Labor, Farmers' Alliances, cooperative associations for marketing, in fact associations for any trade or labor purpose, and in no State have the courts questioned them; only in the case of corresponding associations of capital or employers have they been challenged by court or statute.

But the labor interests have gone farther than this and sought to get special protection and peculiar privilege for organized labor and especially industrial labor, different and greater than is accorded other organizations or agricultural labor or personal service not so organized. Such are statutes restraining employers not only from discharging men because they are members of labor unions, but from requiring as a condition of employment that their workmen should not join such unions, or even from making free choice in engaging their help among union or non-union men; statutes exempting associated workmen from the ordinary penalties of the criminal law or the common law of conspiracy, in matters of strikes, picketing, assault or threats, boycotting, and interference generally with the principle of liberty of trade or labor; statutes exempting laborers from all control by courts of their conduct, especially under the injunctive process of courts of chancery, making indeed of them a privileged class. This most important matter must be treated in a later chapter, when we discuss the great problem of how democracy is facing the power of association, *imperio in imperio*, organized human authority within or beside or outside of the official government. English democracy yielded

to the pressure some years ago, exempted all matters of industrial dispute from the common law of conspiracy; but although the late leader Gompers devoted his life to the effort to secure the same result here, he only met with a partial and somewhat illusory success in a Federal statute and none at all in the States, save only Maryland. In the matter of injunctions however he met with far greater success, securing in most States legislation curbing the courts in exercising equity powers against workmen in labor disputes, in one State in effect exempting them from injunctive process entirely—Arizona, where however the law was declared unconstitutional by the U. S. Supreme Court—and in many providing that before punishment for a contempt they should have an ordinary jury trial, with all the safeguards of the common law. And many bills have been introduced in many State legislatures with the general aim of authorizing any kind of united action, strikes, boycotts, or even intimidation as by picketing, by organized labor against non-union men or their employers, which would put both the latter at the mercy of the union or its walking delegate. The result of such monopoly of labor was seen in the railway strike of 1916 and in the anthracite coal strike of 1926; it remains to be seen how far democracy will suffer rival potentates to grow up within it; already, beginning with the Roosevelt coal commission, coal miners' leaders treat on terms of equality with the Federal government, and make treaties with it, as by "the high contracting parties"—to use the diplomatic phrase—of equal dignity. And in England affairs are the same; only more so. "The King's government is carried on" but with the consent of the workmen of basic industries; and the premier makes treaties with them, buys off their strikes, or offers subsidies, bribes, as the emperors of Rome did to the Gauls.

Yet our democracy has done rightly in awarding all pos-

sible protection to labor, including its legitimate organization. "Union labels," for instance, have been sanctioned and protected by legislation in nearly all our States. Their claim for the wage of their labor has been protected by laws of all our States, giving them a first lien or claim on the employer or his property in case of insolvency. In California and some other States, even the shareholder in a corporation has unlimited liability for all debts of the company to its employees; as in old Scottish law, a man holding one share of stock in a California corporation may thus have his entire fortune wiped out. Then wages or wage-debts are often if not usually exempt from execution or attachment by his creditor. The laborer is often entitled to special attorneys' fees, double damages from the defendant, early trial or other special privileges in the courts, and no legal exemptions from attachment or execution are valid as against his claim, and no security for costs are required of him; laws against trusts and combinations may not apply to him; his agricultural productions are entitled to special rates on the railroads, and he himself to a free passage if he go with the cattle he ships, while if the railroad train runs over one of them, it must pay double its value, and that at once.

The effort of American labor interests to keep out foreign or alien labor is not of course peculiar to our democracy. The far Western States passed laws that no alien could be employed by any corporation in the State; New York and other Eastern States that he could not be employed on any public work. All such laws have been denied validity in our courts, both State and Federal, as against treaties and general international comity. But by Congress itself the "Mongolian" (including under that term the Japanese, just as our courts include the East Indian among non-African black) has been forbidden entry, to say nothing of citizenship; while the far Western States have done their bit where they had

the power—by denying him land-holding or education in the common schools, at least in the same room or school with the other children—as was done in the South as between whites and negroes. But such action is not peculiar to our democracy—South Africa and Canada have acted similarly—nor indeed perhaps to a democratic government more than a monarchical one, except perhaps in so far as the latter is more under the influence of the employing classes.

There were no less than twenty-three States which sought specially to protect the industrial laborer from undue influence upon election days. He must be given time to vote; no threat of stopping the mill, or opening it, must be expressed by his employer; nothing political must be printed on his pay-envelope; he must be allowed to be a candidate himself without losing his place. In a few States we find a law forbidding his employer to discharge him or dock his pay for serving on militia duty; and the unions have begun to forbid their own members from such duty. And various other safeguards are thrown around him,—fair enough, though one would suppose him not a child, capable to look after himself, politically or economically, as well as the domestic or farm laborer, who is not so protected.

So far, in 1907. Before proceeding to make a cross-section of our democracy's work on this subject twenty years later, we may recapitulate that it has certainly shown a very distinct radical tendency in labor affairs, conjoined with a tendency we can hardly call other than reactionary, to re-submit the workman to control of his action and his contracts, not only by the State but, as in earlier times to that of the guilds, now to the labor unions. And we must note that although our country is the greatest laboratory of democratic experiments in legislation, they are only here controlled by a judicial arm seeking to preserve constitutional principles. The reader may object that the question whether

a law of control of the individual in his actions or industries is constitutional under the form of government peculiar to the United States (in Argentina, of South American countries, the same power is given courts by their Constitution, but they rarely venture to apply it) makes no necessary part of the study of the output and product of modern democracies in general. But the subject of constitutionality here is germane to our discussion: for our national Constitution, except in its merely administrative part, is nothing but a juridical expression of what in the times of Paine and Jefferson were called the Rights of Man, which, in the theory of all its pioneers, democratic governments were devised to establish and protect. Any such constitution-interpreting decision of an American court, therefore, against a law, marks a departure of our working democracy from its primal principles, and, in labor affairs, usually a recurrence, although by a representative and elective legislature or even a popular referendum, to the system of control of the individual citizen as by an autocratic government. The fact that this government is now a democracy—rule of the people—does not alter the ethics of its action, its nature, and its result upon the individual human life. It is only that the American government has a brake, a check, which Belgium, France, or even Great Britain save in sentiment, has not; and our Supreme Court's decision rings like an alarm bell when the limit is reached, a fundamental liberty or right touched. In public labor concerns, as we have shown, there may be any amount of state control; yet the respect for freedom of contract is so inbred in the American mind that even there laws of restriction were at first by most courts held unconstitutional, particularly as they necessarily imposed a punishment or penalty, that is, made a crime of the voluntary choice of the workman to work more time than the law allowed.

Then another American principle generally taken as constitutional is that against class legislation. Though nowhere distinctly or succinctly stated in the Federal Constitution, it is in that of several States, and with that forbidding monopolies, which is stated a little more definitely, must be taken as clearly implied, for all our courts from the beginning have given the principle full effect, indeed only comparatively recently have they qualified it by admitting the principle of reasonable "classification"—a somewhat vague term, usually employed in tax or revenue laws, meaning that different conditions or different classes, or corporations as distinct from persons (though not localities) may be treated differently in law; either exempted or subject to lesser penalty or tax—a rift in the great principle of "equality before the law," already widening visibly.

Moreover, while we have found a tendency specially to protect industrial labor, we cannot say that this tendency is wholly devoid of selfish interest. Not only do our States in some things compete with one another for the favor of the capitalist, but the progress they have made for the workmen's benefit is largely limited to those trades which are perfectly organized in unions, or which are so numerous or class-conscious as to present a substantial voting population. Nor, except in matters of taxation, does our democracy yet extend much protection over agricultural labor or domestic service—where indeed, in the present demand, it is hardly needed—and none at all over clerical. The pleasure of wearing a white collar and a black coat still makes up to the wearer—or the wearer's wife—for his being the poorest paid skilled laborer in the land.

Yet with all this it can hardly be said that our legislation is more progressive and protective than that of autocratic countries such as Germany before the War, still less Belgium. Our sweatshop, and women's labor laws, are distinctly

less enlightened. And such progress as has been made appears very largely to be political in origin, or selfish both in inception and application. That is to say, democracies tend to protect, or even privilege, a class or trade in proportion as its union is powerful or its trade has votes.

In this great subject—democracy's regulation of labor, the relation of employer and employee, interference with or control of the labor-contract and conditions of the workman—which are, after liberty itself, the matter perhaps of most general concern to the individual, space has compelled us only to consider our American democracy; but conditions in England are much the same, perhaps even more control is exercised, in France less; but our experiments have been more varied than any, though Australia and New Zealand are far more radical.\* But they are isolated communities with peculiar industries, screened and protected from a world's competition, and radical as their legislation is, in the matter of wages, hours, conditions of service, arbitration and strikes, it has not prevented the last nor generally met with such success as to encourage other countries to copy it. England indeed has adopted the dole, but that was a War consequence; she is not yet committed to the principle that the community always owes to the individual the duty of finding him employment or a substantial allowance for living in idleness when such employment is not found—or not accepted. The Australian democracy does seem so committed. But we have not yet anywhere enacted a compulsory minimum-wage law, or, save in one or two States, an old-age pension.

One important, if apparently trivial, cause of our mass of State lawmaking concerning labor, or social, matters, should

\*As counsel to the United States Industrial Commission, the author prepared, about 1901, a complete digest of the labor legislation of all our States, as well as of the other more progressive nations. They will be found as Volume V and Volume XVII respectively of the Commission's Reports; they contain substantially all the labor legislation of the world at that time.

not be lost sight of: it may best be named "experimentation." Drunk with the novel power of making laws, our democracy, and still more that democracy's representatives in a legislature, who are painfully conscious that they must justify their job by some legislative output, will try—and try in an interesting manner—all kinds of things. So long as our State and Federal systems exist distinct, the States will be interesting—and safe—laboratories for such experimentation. Were we to become a centralized democracy, they would indeed be dangerous; because, practically (particularly when injected into the Constitution) incurable and irremediable—except indeed so long and so far as our courts maintain their courage, and are still permitted to insist on the cardinal rights, even as against a popular majority.

Now what is the outcome of all this? In a joint debate in New York with Samuel Gompers before the National Civic Federation, he admitted to the author that the boycott and sympathetic strike, conjoined with picketing and complete exclusion of independent labor, if not by law by union rules, were necessary to the aims of labor. In conversation (though not in open debate) he afterward yielded to my arguments that the former two were, under the English common law, illegal, and any statutes attempting to legalize or enforce the latter might be unconstitutional—being an Englishman, he did not understand our Constitution, and therefore cared little about it—but closed the talk by saying that, lawful or not, they were the only possible offensive or defensive weapons of organized labor and therefore it must have them. To this, there was of course nothing to be said. Undoubtedly, our radical labor unions will be glad of statutes which make any kind of combination to strike, or to boycott their employer, or even outside persons, or to control their fellow-workmen or even competing workmen, legal. As we have shown, the British Parliament has almost "gone the limit" in



this direction, but their Act would be unconstitutional here, probably in the Federal courts, certainly in the States whose constitutions have an express provision against class legislation; and most labor disputes are still determined under State laws. And "equal protection of the law," in the Fourteenth Amendment, is no mere phrase. Yet some States have already provided that there must be an overt act, criminal or unlawful in itself, in all cases of combined action, to make it a conspiracy. Such a law, if it applies to everybody, is all right under the Constitution, however much it may upset the common law of unlawful combination; but it is somewhat difficult to reconcile with the laws usually existing in those same States against trusts, whereby a combination of employers or manufacturers is made a criminal offence, even when they do nothing more than fix a price for a line of goods, which obviously would not be an unlawful act for one person alone. In the same manner, many State anti-trust laws make an exception of trusts in farm products or combinations in agricultural business.

The abuses of "government by injunction" have been attacked in many States. Nebraska passed a law which practically wipes out all equity powers of this sort; others followed; it would seem then that if a body of strikers even went to the length of stopping a railway train, or deserting it in a desert (and this has actually happened) they could not be arrested and held for the act, even though a contempt of court after an injunction had been issued, or restrained by any equity process at the time, but could only be once arrested and then must be immediately discharged under a common appeal bond until such time as they could be indicted and tried before a future jury, many months after the riot had ceased.

Many States have adopted laws forbidding the protection by private effort of private property, as by Pinkerton men,

private police or watchmen. The enactment of both of such laws side by side would paralyze "the resources of civilization," the arm of the law on the one hand, and on the other make criminal that right of self-protection which was inherent in English freemen before modern law began. The fact that through the bungling of Congress the executive branch of the government was led (by the Sherman Antitrust Act, etc.) into the exercise of a power which properly appertained to the judicial, would, if it were true, be no excuse for such blind legislation as this. It gave the handle to Debs to agitate against so-called oppression, to say "he was enjoined off the face of the earth" when only ordered not to trespass on a certain piece of property; and led to a more extraordinary instance since, the celebrated Daugherty injunction in the apprehended disorders of 1921, which practically deprived railroad employees of their constitutional rights, as well as all right to defend themselves in the common-law courts.

We have now run over our American labor legislation in its most radical ten years, 1,539 laws; their general characteristic, outside mere sanitary or police regulations: (1) to seek to give the industrial workman special privileges or (2) to seek to control his action or that of his employers or others, in his peculiar interest. Of thirty-five kinds of legislation, twenty-one were held, as to some one law or several, by some court, inconsistent with the State or Federal Constitution—which well accounts for Radical hostility to courts, but also shows the willingness of a democracy to sacrifice cardinal liberty principles for immediate, even class-selfish ends.

Since 1907 there has not been very much radical advance—principally in the direction of further protecting labor against equity process. But there has been distinctly no more attempt to alter the ordinary criminal law of assault in favor

of strikers; on the contrary, many States have adopted drastic statutes against intimidation, threats, or even ordinary picketing. Such statutes indeed enact but the common law. Thus, threats, intimidation or coercion are forbidden (as they should be, to make the law constitutional) to both employee and employer, from labor unions to individual workmen, specially; it is a penal offence to prevent any person from entering into or continuing in the employment of any other person, or to prevent the employer from employing, or to interfere in any way with his lawful trade, his tools, or his property; for several persons to combine together to compel another to employ or to discharge any person, or in any way alter his mode of business. Some States have a statute, of course unnecessary, to make peaceful strikes lawful; others the statutes existing, in New York and many Western States, against boycotting—which, being a conspiracy to do a private wrong, was always “against the peace” whether of the King or the sovereign people. And many States have passed laws against blacklisting, which is the same offence the other way about; that is, it is a combination of employers to prevent individual employees or a class of them from getting employment. Some States went to the length of compelling the employer to furnish the employee with a written statement of his reasons for discharge; this was often held unconstitutional, one court asserting that, as well as the right to free speech, there was a constitutional right to silence! In the ten years analyzed, there were about a hundred statutes passed of this emancipative or protective kind, few or none of which however did more than state or define the common law. State employment bureaus became common, corresponding private agencies were in one or two States forbidden—unconstitutionally, the court held. And very many States adopted ambitious and intelligent systems of arbitration or conciliation,—never, as yet, compulsory.

In the twenty years following, the number of trades made subject to license tax and State examination or certificate—the latter usually for the sake of the former—was enormously increased, checked only by the national constitution when such fees became a tax upon interstate commerce. War veterans were commonly either exempted from examination or preferred in public service, not as yet in private employment by any law, though a law exempting Confederate veterans from the payment of such license taxes was held void. So, the right of a person to peddle the product of his own farm or garden without paying a license to the State was vindicated. The usual hours of labor, method of payment, truck or company store laws, went on; and the laws to prevent discrimination against union labor. Nearly all boards or commissions or State examiners summarized above (p. 87) resulted of course in State control over the trade concerned, and in so far took away from the liberty of labor; in a few years we added to such trades no longer freely open to anybody, barbers, embalmers, nurses, veterinary doctors, intelligence offices. South Dakota appears to have adopted the first American mandatory minimum-wage law—\$12 a week; and Pennsylvania the first general old-age non-contributory pension law—\$1 a day to all U. S. citizens over sixty, already followed in other States. In 1919 the intelligent legislation to give employees an interest in the business—already widely done by the privileged right of stock purchase given them in the greatest corporations—is begun by a Massachusetts law permitting manufacturing corporations to have employees as directors. Minimum-wage laws for women and minors become more common. They are still usually only recommendatory by public board on investigation. Laws regulating child labor become more general, and will doubtless be more usual still since the defeat of the constitutional amendment to have the Federal government impose them; so the dangerous-trade,

sanitary and moral-protection laws; generally compulsory compensation to workmen for injury is being fixed by law, or referred to a board, to the very great benefit of both workmen and employers and to the injury only of the "accident lawyer" and his tout.

In legislation distinctly radical, we only note the following: in Michigan and Montana women and men must be paid the same in all employments, *public* or *private*. In Washington, North Dakota and Oregon, *no* injunction\* may be awarded in labor disputes except irreparable injury to property be pending. Some States have adopted a system of mothers' pensions. Not a very formidable tale. Socialistic experiments—such few as there are—we leave for a later chapter—the American citizen is distinctly not a socialist; they are even in a minority in organized labor. Yet we are doubtless on the eve of a general wave of legislation to provide for the aged, the mothers, and the unemployed, if not to throw upon the State as a permanent duty the question whether all its able-bodied men are employed at satisfactory wages, and if not, why not; perhaps even the finding for them employment by public work or public agency. To those who with Thomas Jefferson and Herbert Spencer believed that in such cases the duty of the State, as such, ends with the distribution of bread *in forma pauperis* the advance is a far one, indeed. But this wave was more apparent in 1900 than to-day. Few laws embodying a socialistic principle (other of course than in taxation, which pertains to property, and will be discussed in that chapter) have been passed since; and they are confined to seven or eight States in the far West. The prediction made in this chapter as published in 1897 was not borne out by the results; and it has proved to be Federal legislation,

\*The abuse of injunction was first called to public attention in 1895. See "The Modern Use of Injunctions" in the *Political Science Quarterly* for June, 1895, reprinted by the U. S. Senate as a public document in 1902 ("Injunctions in Conspiracy Cases," 50th Congress, 1st Session, Document no. 190).

Acts of Congress, not of the State legislatures, which set the more reckless example; partly because, under our government, the Federal authorities can do many things, as for instance the establishment of bounties and the absolute power over interstate commerce and its agencies, which the States, under both constitutions, may not. Yet the charge that our laboring population is so often led to make against the courts, is not justified, particularly as to the Supreme Court of the United States, as Mr. Charles Warren has well shown in a book devoted almost entirely to that question. It is our legislatures that are at fault,—our legislatures, angling for votes, or baited themselves by organized lobbies. And labor leaders distrust human experience, as socialists detest clear thinking. Between the two, and the desire of our Solons to appear “friendly to labor,” almost everything goes. And underlying all are the fundamental misconceptions of the day,—that the State, because it is based on universal suffrage, may wisely tyrannize over its members; that a government, because instituted by and for the people, has the duty of bringing dollars to their private pockets.

Democracy, in this matter as in personal liberty generally, has clearly gone over to the principle of Control. Far from protecting the right of labor to join or to practise any trade, for any employer, and to be able to contract freely therefor or thereabout, without duress either from the State or other persons, it is quite indifferent to all such considerations. It acts, particularly when impelled by politicians or special interests, without the slightest doubt of its right to control, to interfere, to permit, or to prohibit; and that not always nor often in the interest of the whole body politic—the people—but of the persons or trade to be benefited. In the American democracy, it is restrained by a constitution; in other English or French-speaking countries not; Spanish-speaking democracies do not venture to interfere with per-

sonal liberty other than political. In England the control has gone farther, though ours has extended to more subjects. And the great power and growth of non-official government—as well as the tremendous result of the admission of women to political rule—have supervened to make all seem uncertain. But these things must be considered in chapters by themselves.\*

\*This chapter, first appearing in the *Atlantic Monthly*, was expanded and enlarged, with an analytic table of the labor legislation for the ten years 1886-1896, showing what laws were declared unconstitutional, in the *American Journal of Social Science*, No. XXXV, December, 1897. It is now re-written from the viewpoint of 1929.

## CHAPTER IV

### PROPERTY

Although some recent writers question it, the received opinion can hardly be doubted that mankind, in its progress from savagery to civilization progressed, and in that order, from the hunting stage through the pastoral, then the agricultural, and lastly to the industrial. Such scant inductions as we may trace in contemporary savage life show that there is no stage of human existence where some property right is not recognized. To begin with the savage hunter: it may surely be hazarded as axiomatic that he claimed an exclusive property right in the beast, bird, or fish that he had killed. And doubtless this right was soon extended to the club, spear, arrow, or sling that his own hand had fashioned; to the skin or fur of his quarry when made into a garment; hence to all his clothing and weapons or traps. In the pastoral stage this property concept must have extended *ab initio* to the sheep or cattle he had tended or reared; the very word *cattle* shows this; in the earlier spelling, *chattel*, it is still exactly synonymous with what we call *personal* property, i. e., individual, that to which no feudal claim of overlord or state can attach. While there may in some cases have existed a tribal ownership of the herd, as well as of the range or pasture land, that right, though collective, would have individually been asserted as a property right against a neighboring tribe. That a strong sense of tribal property in land existed even in the predatory stage is clearly shown by the example of our North American Indians; otherwise their right would hardly have been recognized so universally



as it was in the payment of money or other value for the relinquishment of the Indian title to definite territories, made alike by Quaker, Pilgrim, or Dutch settlers. The Spanish alone made no such payment; but that was because they believed that they were saving the Indians' souls.

The *exclusive* possession of definite areas of land was not necessary in a predatory civilization; though even there we may be sure that the man of the Stone Age, from China to Peru, considered that he had a property right in his teepee or tent—probably even cave—and its immediate enclosure, which he would use force to defend; and *la force prime le droit*. And the institution of common land does not challenge, but asserts, the ultimate right of private property. As there is no record of any age, people, tribe or place to-day where some kind of private property is not recognized in somebody—even soviet Russia—as, in Russia or Oklahoma, the fruits of a man's own effort or labor,\* spoils of the chase, or crops of land not held in common always are—so there is no record of ancient law where this primal property right is not assumed as axiomatic. The modern "Red," shrieking that all property is robbery, has therefore the world and all time against him. His case is only arguable when he limits it to property derived from the labor of others, or land, or other natural monopoly. That the right is axiomatic in Anglo-Saxon countries is shown, as we have seen, by the simple fact that there are no early laws declaring or defining the property right, but only laws declaring the punishment of theft.

By observation the same strong property sense may be seen in the child or animal. Next to that of personal liberty, no right is more primordial. Just as a wild bird will beat out

\*But how trace "the fruit of a man's own labor"? There is not a single article, manufactured or even agricultural, which can be said to be the fruit of one man's labor only.

its breast on the bars of a cage—the Quetzal, or bird-of-paradise, adopted for that reason by the republic of Guatemala as its emblem, dies if deprived of liberty—so will a child resent being locked in a closet or placed, though for its own safety, even in an open air play-enclosure; so will child or animal fight, perhaps to the death, for anything it deems its property, though only so by discovery, as a dog for a bone. And very early this sense of property extends to what we call *real*: as, to a child or a dog, the possession of his particular seat; to a bird or beast, the possession of its nest or lair. “That’s my place” is a sentiment universal in all intelligent life.

Property in land, said in modern times to originate in discovery, or, once discovered, in conquest, rests, in either theory, on a similar reason, for it is the fruit of some personal effort on the part of the claimant or his forebears. The word *real*, according to Skeat derived from the Latin *res*, a *thing*, through the French (not, as one might be tempted to suppose, from the Spanish *real*, royal), would seem to indicate that it was regarded as higher form of property than personal; although actions about it were *in personam*, not, as with a ship, *in rem*, yet its ownership gave a *status*; it made the person, rather than the person the property; feudal ownership entailed so many more things than a naked property right that it may be set aside in our study as anomalous. Straight individual ownership of definite land areas appears to have existed in all Mediterranean and Asiatic civilizations; but with the Tartars or Teutons only as they emerged from the pastoral into the agricultural stage. Until then it was not necessary. But, whether under a feudal or allodial system, it does not appear, when laws began to be written out, that property over land was considered any less sacred than personal; rather, more so. It is only when the end of the open land or monopoly in other natural resources, began (or be-

gins) to be apparent, that private ownership in land is questioned; just as, much later, in Marxian times, the private enjoyment and use of "capital"—machinery, coal, raw materials or other personal property used to create wealth—began to be attacked when, in an industrial civilization, it was seen to be the sole or principal means of creating new wealth.

It is necessary thus briefly to run over this ancient tale to explain why and how, even with Tom Paine and the French Revolution, property had come to be considered a natural right of man. Magna Carta impliedly, the French Declaration of the Rights of Man in 1793, and before that twelve of our States and the Federal Constitution, expressly call it so. And of the new States, only Oklahoma and Missouri follow North Carolina in limiting it to the fruits of the owner's labor. All these other basic laws, English, American, French, describe the right broadly, abstractly, without qualification either as to personal or real property. Jefferson, in the Declaration of Independence, with one of his almost uncanny *flairs* for the future, alone left it out—unless, contrary to all New Testament teaching, it be considered included in the phrase "pursuit of happiness." However that may be, the honest thinker cannot question that the institution and the protection, to the very extreme, of private property rights has, hitherto at least, been the badge and test of advancing civilization. Oriental "semi-civilized" countries, disorderly states, have failed to advance *pari passu* with Europe mainly because there was not real protection for this right as against arbitrary seizure or levy, or as against excessive or unequal taxation, whether by despot or by popular assembly, such as there was against any other despoilment. Even India, whose huge and dreamy civilization may have given other explanation, mainly religious, for its lack of industrial "progress," does not pretend to protect the individual except as against his neighbor. The corruption of official China, the absence of

impartial courts of justice, has the same result. Moreover, any Oriental would rather take his chance of favor from a courted autocrat than go into judicial courts on even terms with his fellow men, even if he believed in the possibility of just courts or could comprehend their function. And finally, the Oriental world is frankly governed on the principle of *control*, not *protection*; a matter of which we shall have much to say later.

Returning therefore to our civilized world as it has so far gone, and the Western world in particular—leaving socialism and its variants for later comment—we may say that our idea of “civilization” has as primal requisites individual liberty and private property; that government is, or was, instituted solely to protect these things; that it was far from the minds of the eighteenth-century founders of democracy to control men in either, or, by a super “State” to usurp men’s free exercise of them. And we ourselves—unwilling as we may be to follow Paine or Jefferson or Locke in their “natural rights” idea, still less the stern *laissez-faire* school of nineteenth-century Manchester—must frankly admit that civilization as we understand it, industrial progress, the wealth of nations—and probably even of individuals—has up to now been exactly, in all countries, in proportion as, after the liberty rights, the property right has been asserted and safeguarded.

On the whole, while democracy has, somewhat surprisingly, in the United States at least, shown itself more sedulous in respecting the property than the liberty right, it has shown itself less so as to both than autocratic European governments. Save only in the matter of political arrests, these last have been more than glad to leave to the individual all possible personal freedom, provided only he did not agitate against the government; and have more fully respected property rights even than our republic; taxation, common to

both, we have (or had, up to the Great War) outstripped them in; and have far extended the scope of eminent domain, as well as regulated the use of property by regulation of rates or profits, even, since the War, of rents. Democracies have so far maintained the theory of private property—wholly as to personal property, less so as to realty—but its use, its enjoyment (under the “police power”), its possession even (under enlarged ideas of eminent domain), most of all, its *profitable* use, to make more property, has been enormously restricted, more so than under any autocratic power in modern times. Taxation, the only original restriction on property privilege (even before the Great War) had increased, in our State, Federal, and municipal levies taken together, to an amount far exceeding the burden which is said to have caused the French Revolution. And finally, the right of inheritance (which, so far as we can judge, in England and even more in Eastern countries had been regarded as primal and coeval with that of property in present possession) has been, in theory and largely in practice, taken away.

The existence in the abstract of the right to any and all property, as “natural” or, at least, essential to civilization, has not yet, save for the Oklahoma clause, been challenged by modern democratic government. Prudhon’s “property is robbery” has had no political reaction, save by avowed socialists or communists, and even they admit the principle of property of some kinds or—as even the Bolsheviks—for some class. The luminous anecdote of the lady venturing into the streets of Leningrad—then still Petrograd—shortly after the Bolshevik revolution of 1917 and who, being robbed by a Bolshevik of her valuable fur coat, had the presence of mind to say, “Why, I only stole it myself this morning,” to which he answered, “Oh, if you stole it, you can keep it,” and she got it back—indicates, even in the Bolshevik’s mind, an acute sense of the right of property when legitimately

earned. Had she bought the coat, or made it with her own labor by the use of implements, shuttles or spindles (true "capital" in the Marxian sense) she would have had no proper title, according to the Bolshevist idea. It would be interesting, both psychologically and for the publicist-historian, to know at what point of the human intelligence the savage added to the wild beast's insistence on keeping his prey by force because he wanted it himself, the idea that there was some sanction for that possession other than "*la force prime la droit*"; still more, to know when first that notion gained respect from his fellow men. When first could a man safely lay down his weapon or his food and find it safe when he returned? At what stage of human development was even such property recognized? Very early; for animals have it, dogs notably, and not only as to bones, but as to their precedence in rank of affection, their place in bed or at table; and a dog will, amusingly soon, learn the boundaries of his master's estate, even when unfenced, and guard it with exact sentry-go. And in Maine, before the tourist, as in Colorado before the hoodlum, you might safely leave your canoe, or even your rifle, by the river, or your range-cabin full of provisions, with the door unlocked, and be sure you would find all safe on your return.

But though democracy has not denied the principle, it has become far less dogmatic. No one would glibly descant on the "*rights of property*" as did Tory and even Whig England in Victorian days. It is men, we know, not property, that have rights. Nor even, save in the liquor trade, of "*vested interests*"; while with us, no interests are vested save those guarded by the sanctity of contract, and the very word "*the Interests*" is only used as one of opprobrium. In our modern North America (South America, individually speaking, is more conservative) property has no rights save that it cannot be taken by the state without due process of law—and it has not even this much in England, where any Act of

Parliament *is* due process of law. Nevertheless our constitutional safeguards, particularly in the Bill of Rights of the first ten amendments, and the universally expressed guaranty, in all our constitutions State or Federal, of property as a cardinal right which both governments are pledged to protect, make our government, in form and functioning, the most conservative government in the world—save only for matters of taxation, where we are generous; and control, where we are liberal. France and South American democracies will not, broadly speaking, stand for the direct taxation of property; and France alone, by reason of its strong social individualism (contrasting so curiously with a national collectivism and the very extreme of centralized government) stands in fact, if not in theory, more steadily for the protection of private property.

But if the structure stands apparently as high as ever, its supports have been steadily and of late rapidly chipped away, in England and here. This matter is so familiar that one needs only a reminder. We have just indicated the three lines of attack: taxation, the earliest and most direct interference of all governments with absolute ownership, as a matter of common observation has been made more onerous in our democracies than in most autocracies or even in earlier England. It is true, the state gives far more "public service." Yet it is probable that not a despot in history would have dared impose the amount of tax now collected from a citizen of moderate means in—let us say Ohio or Massachusetts. Moreover, earlier taxation, being imposed by the government of feudal landlords, fell rarely directly on the land, though still the largest body of property; and so also in Spain and Spanish-American republics: imposts, excises, octroi, tenant-duties, multiplied; even income taxation was (as lately in Argentina) conceived of as possible (though the farmer never pays any)—anything was preferable to a direct tax on

the land itself. Politically, this is probably because such taxes fell on the most powerful, as in South American republics, and in our own, originally: for the Constitution expressly forbade any national tax on landed property, and does so still except as to the income therefrom; but also because direct taxation is always unpopular, though the fairest, safest, and cheapest, as Adam Smith first pointed out. The tendency of all governments, democratic as well as autocratic, has been to run directly counter to this maxim, and try to impose taxation subtly and indirectly, so that the "ultimate consumer" might not be conscious what he was paying. Import tariffs, even when imposed for protection and not for revenue, are still cheerfully borne by a public which jealously watches the direct income-tax. And indeed it was the intention of our founders, to free them from such direct taxes, except locally, for the State; the Federal government was to pay all its expenses from the excise; as was the case down to 1913, and is still the case in Argentina,—with Uruguay, the most advanced of South American republics, and the country which most nearly copied our own constitution,—and in several autonomous provinces of England and Spain—Bermuda, for instance, and Majorca; their people say "we have no taxation"—i. e., their entire expenditure is raised from the customs duties. And, both with England and with us, it was wars that made direct taxation necessary.

Nevertheless it is common observation that when advanced democracies desire funds for expenditure under majority vote, they are more extravagant, more reckless in imposing even direct taxes, than are aristocratic or oligarchic governments. The burden of taxation on the free American citizen far exceeds that on the French bourgeois before the Revolution or on the citizen of any civilized state in modern times, hardly leaving out the extraordinary taxation consequent on the Great War, and this both in amount and in pro-



portion to his income. Even in England, while the very rich man is taxed more, the great middle-class suffer not so heavy a burden as ours. The wage-earner of course escapes direct taxation in both countries, though he doubtless pays more for his rent. The laments of the British, and still more the French or German war-debtor, are thus unfounded; the usual comparison is misleading, for the British publicist compares his burden with our *Federal* taxation only, which, much as it has increased (and is still likely further to increase) under present centralizing and bureaucratic tendencies, and under the insidious "fifty-fifty" laws, which bribe the States into increased, or new, expenditure by putting up from the Federal treasury an equal amount,—is still but a small portion of the tax paid by the average individual. Take a man with a \$10,000 income, living in and owning a house and land worth \$30,000. He will pay one or two hundred dollars direct tax to the nation; but his *local* taxation, State, town, county, school district or whatever it may be, will, in Massachusetts for instance, amount to \$1,400 or \$1,600 (according as his income is earned or derived from investments). And this is all *direct* taxation, and of the most homely and local kind; voted by his fellow-townsmen in that town-meeting revered by our theorists as the most long-surviving of direct democracies that we know. Every one has a voice in the town's expenditure, and almost every one is quite reckless in imposing tax burdens. Many a Massachusetts, and more Ohio, towns purport to exact a tax of 4% or more of the capital value of all property within their corporate limits. Our socialists, who clamor for recognition of their doctrines, fail to notice that in a State where the average total taxation comes to 4% or (counting the Federal) 5% of the principal value of real property, you have already realized one-half of the socialist's ideal,—the half which requires confiscation by the state, "nationalization" of the earnings of capital—the

other half being of course the regulation of the production of wealth as well. No economist will deny that 4 or 5% is a full estimate of the fair average earning-power of productive property, allowing for idleness, depreciation, etc., as any trustee will tell you and as the average bank rate shows. In the middle West, we are told—certainly in Ohio—the direct local taxation has become so onerous that the very well-to-do cannot afford to live elsewhere than in New York—which, (they say) being a city of Jews and traders, does not tax portable values. So, the extreme exponents of modern radical democracy, Australia and New Zealand, we are told, are no place for the capitalist, and the capitalist has ceased to go there. On the other hand, here and in Australia, we unquestionably get a far greater average of comfort for the laborer, skilled or unskilled; for the man who supports his family out of what our extreme friends call “wage-slavery.” (Yet again I would remind them that it was Wat Tyler who elevated the British serf to a freeman by exchanging his previous condition for a money-wage; and wages, rather than payment in kind or on shares, have been considered the very badge of free labor ever since!)

Thus, far from lightening, democracy greatly increases taxation; albeit the money raised be devoted to what the majority deem social ends. If truly so, and well-spent, all is well; and surely there is one great service democracy renders even to the property right,—or, let us say, institution—it is essentially opposed to the chief burden of modern and indeed ancient taxation (the first tax ever imposed in England was the Danegeld)—war; and expenditures on preparation therefor. This may seem a surprising statement in view of our own government’s budget showing something over 85% per cent spent on such matters—but it may be suspected that on this point democracy has not been fully heard from yet. Democracies do not make war; not even, in the long future,

for trade, or oil, or opium; though exploiters or dollar-diplomacy may drag them into it unbeknownst. Even to-day with us you would not get one vote in ten for "intervention"—i. e., making war—even in Mexico, were the business purpose or private interest baldly stated. It must always be for "self-protection"—"conditions are intolerable"—"outrages on American citizens"—"Cuba a nuisance under Spanish rule, menacing the health of the United States." Some such sugar-coating is necessary before even our present half-educated and ring-ridden populace will swallow the pill of war. But this, perhaps the highest justification of democracy, we must leave for a later chapter. Italy, under Mussolini, Spain, in Morocco, the German Empire under a William II or a Bismarck, furnish no exceptions; it is so obvious that they failed of peace precisely so far as their democracy failed of rule.

Wise, if cynical, statesmen have said, the world (of democracy at least) is swayed not by principles but by phrases. Some are true, some are only specious, some are definitely misleading; but they all have an "I see what you mean" sort of truth, or they could never lead, or mislead, whole multitudes. "Taxation without representation"—"a nation half slave, half free"—"the cross of gold"—"man descended from a monkey"—"the white man's burden"—"foreign entanglements"—"make safe for democracy"—"a war to save our skins"—"the American flag once up must never be hauled down"—"swollen fortunes"—to this last, of Roosevelt's, we may attribute the unprecedented democratic experiment of a surtax in time of peace. Yet a moment's thought will show its portentous novelty. Our early State constitutions, Massachusetts, for instance, in 1780, say expressly that all taxation must be proportional; and I fancy this would have been thought an axiom by Locke, or Jefferson, or even Paine; the Federal constitution also seems to imply it;

it took subtle decisions of our Supreme Court to invent the doctrine of "classification" and pronounce that the "equality"—which the Constitution does demand—was to be interpreted as meaning geographical equality only. A levy on capital—and all disproportionate taxation must be so regarded—is a simple denial of the essential principle of private property. It does not tax; it takes. It in no way differs from a possible socialistic law which should say that all a man's earnings and income (only there would obviously be no longer any productive property and consequently no such income) above \$5 a day should be taken by the state and applied to social ends. (The fact that no man's work would in such case be worth more than \$5 a day and that he would soon refuse to do even that much, but apply for a pension from the state, is neither here nor there in this argument, though apparently almost the only man, woman or young person not getting a pension or dole in present-day England is the person honestly at work.)

Abstractly, therefore, modern democracy has not yet denied the principle of private property; and definite concrete attacks upon it will doubtless, except in time of war, meet effective opposition. But there are the other ways—first, and notably, that of prescribing the use, or controlling the return of property. Inheritance taxes, on succession by devise or the common law, are defended on the ground that inheritance is not a natural right; yet it is as ancient as property itself in the law. However, it is not guarded in the American constitutions. But it is a natural impulse; and though devises speak from the deathbed, gifts by deed cannot constitutionally be forbidden, or taxed beyond some indefinite time. Two years, in England; with us the courts have not fully spoken. But all such taxes indicate another way by which modern democracy equalizes fortunes.

But by far the most usual method of controlling the citi-

zen's use of his property is by regulation of rates, profits, or even rents. This subject is so familiar to all of us that, despite its importance, it may be dismissed in a paragraph.

Resting in part on the secular English doctrine that when the king grants a "franchise" or monopoly, its charges or tolls may be prescribed, but more recently under our Supreme Court decisions on a chance phrase in an early English case that took the fancy of the Justices—"affected with a public interest"—capable obviously of far wider application than the theory of natural or government-chartered monopoly—it soon became apparent that our democracy, at least, would hardly set bounds to its control of the profit-bearing or usufruct of any property which might be found to be "dedicated to a public use," save for the Constitution; which the same court, soon after its original decision in the Granger cases, held to preclude such limitation of rates or charges as would deprive the owner of a reasonable return on his invested capital. Some dissenting opinions have pointed out that almost every trade, short of the fine arts, may be considered "affected with a public interest"; the making of boots and shoes as much as gas to light with or fuel to warm; the phrase was originally employed in English decisions only to designate a franchise—i. e., a state license, usually exclusive—or an avocation resting on it, which therefore the holder was bound to extend on equal terms to all the public, without discrimination, like a ferry, or a tollbridge. Indeed even this did not carry with it the regulation of charges by law, as may be seen in the case of innkeepers, who were bound to receive all guests but never had their charges fixed by law. And indeed it will be found on careful investigation of the ancient cases that the common law generally contented itself with seeing that all customers were treated alike; "extortion" in the old books commonly means only discrimination; and for some years our own interstate commerce law stopped at this;

it was only under the influence of Roosevelt that the Commission were given power to *fix* rates.

But there is no logic in extending the common-law doctrine to ordinary trades or business; and its indiscriminate application to everything, from railroads to rents and life-insurance, will ultimately lead our Supreme Court to a contradiction or a reversal of its own decisions. Indeed, as pointed out in a dissenting opinion, this has already happened in the matter of regulating the premiums of insurance companies. The true basis of rate or price-fixing by law would still seem to be where the common law put it,—natural or geographical monopoly, or one created directly or indirectly by government charter or license. The manufacture of shoes is a public interest; but if one factory charges too much I can go to another; not so with a ferry, a bridge, a railroad, an electric or gas company.

All charters to corporations other than religious were originally granted in England (tempo Elizabeth or late Henry VIII) not because the patentees understood the advantages of a corporate form (limited liability had not yet been invented) but because a royal charter carried with it monopoly. Such is not the case now; and with us, our constitutions usually have a special clause forbidding monopolies; and in a famous case the Supreme Court refused to recognize the monopoly even of a bridge, unless in express terms granted; but the practical monopolies of public service corporations (railroads, street-railways, telegraph and telephone), water (usually municipal), gas, electricity, power,—we are familiar with and have given them the convenient name of public utilities. It is definitely established throughout our States and the Federal government that such may have their rates (or returns—under the recent law) regulated, short of confiscation. What is “confiscation”? A return less than  $5\frac{1}{4}\%$  on the present replacement value of the property, in the case of

railroads, or 8% in the case of telephone companies. The former was determined by Act of Congress, the latter by the Supreme Court; and both seem so precise as to be almost silly; for they do not consider the reward of *risk*.

We omit of course the extraordinary powers assumed by the national governments of all countries engaged in the Great War. Apparently, with us, the war power justifies anything; any Act of Congress or order of the President—or so we thought—but there are famous earlier decisions of our highest court to the effect that the Constitution applies as well in war as in peace. The effort made to continue such control of property rights since the War, on the ground that there is still an "emergency," as in New York and the District of Columbia in the case of rents, will probably fail. In England of course they have no Constitution protecting property (or indeed any one of the rights included in the Bill of Rights) against a simple Act of Parliament.

Of course, in ancient times, the autocratic government of a king in parliament or the oligarchic rule of a town council permitted, and they did freely try for, the control of all returns on property, or even services—rates, prices or wages,—particularly the last—but we have already tried to show how one of the first efforts of democracy, English, American or French, was to throw all such regulations down. Wages indeed had always been fixed *low* under them, just as modern Unions fix them *high*—much more successfully, because customary law is always far more generally obeyed than a statute—and our modern legislation under labor interests naturally takes the opposite course. Wages now are not to be regulated—except by a minimum of hours or pay—but rates and charges are.

Leaving legal history for logic, and assuming property to be a cardinal right in any civilization now practically possible, the only ground for controlling its return must be that

most clearly expressed in the decisions of the Massachusetts courts—"where competition is precluded, regulation by law is necessary." But the monopoly must be State-created; the doctrine has not yet been held to apply to a merely natural monopoly, though action in that direction is indicated by several bills now pending in Congress in the matter of the Pennsylvania monopoly of anthracite coal.

The third infringement of property by modern democracies, eminent domain, may be dismissed in few words. It is not unlike a seizure of a national's property under the war power, or of a neutral's under the doctrine of angary. But American constitutions have imposed the restrictions that the property must be paid for, must be paid for before the taking, and the amount must be determined by a jury. It goes without saying that the number of "public uses" for which private property may, under eminent domain, be condemned has vastly increased under our democracy.

But the last, and by far the most general, attack upon the bald or absolute claims of property is that known in America as "the police power."

It would be interesting to know at what stage of development our primal nomad or warrior, who held his cattle and chattels by grasp of his good right hand, became conscious of his duty, or his tribe of a law, that he should not so use his property as to injure others. This sense is slow of development among children; the common man will build his "spite" fence or drain his land or throw his garbage without regard to his neighbor; and no one is so arrogantly insolent in the selfish enjoyment or use of his property as the new millionaire who has become a millionaire from the counter or the workman's bench. Yet the common law soon adopted the principle, *sic utere tuo ut alienum non laedas*, and modern democracy, particularly in the United States, has extended it from the direct injury of one's neighbor to the safety, health,



well-being, or even any benefit generally considered by the majority as such, either to themselves or to the "state"—i. e., the people in general.

The German autocratic government carried this principle—of state advantage—to its extreme; for the German doctrine frankly was—and is—that the state, the *Reich*, is everything, the people, the individual, nothing. Indeed these are really the two primal schools of political thought—efficiency for the state or liberty for the individual—and as democracy shall adopt the one or the other its future will be determined. Despite the fact that the former is doubtless the classic school, only adopted by Prussianized Germany in modern times, and the French Revolution in theory, and ourselves in practice, the best examples of the latter—to-day modern Latin democracy, even with its strong feeling for individualism, does not go so far. It still exalts the state. Neither France, nor enlightened, if socialistic, Belgium, nor Uruguay, nor the Spanish republics, generally oppose the "Rights of Man" to the powers of the state; while Italy is of course not to-day a democracy.

But in England, Canada, Australia, in other respects more democratic than we are, there is a strong social tradition, although the phrase "rights of property" has been dropped since the Reform Bill, which holds the doctrine in check—the doctrine, I mean, that all property is held subject to the will or convenience of any majority. It has been left for our States, with perhaps Australia, to show how far the police power can be carried. Briefly stated, it is that no form or use of private property is above attack. The reason, or the motive of the law has been held to be, even under our constitutions, unimportant and immaterial; our courts hold that the police power "transcends not only ordinary property rights, but even common sense." Of the wisdom of the law the legislatures, or even the city councils, are the sole judge.

Property being a much simpler concept than liberty, we have been able to devote to it a shorter chapter ; but we may conclude, as in the case of individual liberty, that democracy will show slight regard for theories, or even practice, which run counter to its desires or its beliefs of the moment. If it is to be better in this respect than were, and are, autocratic governments, it must only be because it is more wise.

## CHAPTER V

### DEMOCRACY AS CONFRONTED BY REVOLUTIONS, COMBINATIONS AND UNOFFICIAL GOVERNMENT

Now, leaving the simpler subjects of liberty, labor, and property, we have to consider a matter which affects the viability of democratic government itself. The test of all government is its power to maintain itself against revolt, carried either to the extreme of revolution or to the successful assertion of power, of a class or combination, to control the democracy ostensibly its superior, thus setting up an *imperium in imperio*. The inverse movement we are all familiar with; Mussolini, Napoleon III, Cabrera, Rosas. And as in modern times this super-government will be brought about by combinations of classes or trades, it will be convenient to treat it in connection with that great law of Association—which is an Anglo-American constitutional right, when political or economical (if aimed at lawful ends), or which becomes criminal when with an unlawful end, under the same Anglo-American common law. *Conspiracy* is the feature of our law least understood, even by our own lawyers (though recently, under the stimulus of prohibition enforcement, in some measure rediscovered); it took the genius of a Napoleon first to recognize it as the great juristic principle given to the world by Anglo-Saxons. There seems to be no trace of it in Roman or Teutonic law, as Napoleon's advisers found when they took it bodily over into the Code Napoléon. The invention consists simply: in recognizing the great power of *combination*; that the action of a number or a multitude—the Thirteen of Balzac's romance or the millions striking in England as I pen these lines—differs not only in degree but

in kind from the act of a single man, and hence may be denounced by statute or even restrained by injunction or punished as a crime, though no single act of any individual is criminal or even illegal. It is the *combination* itself that is punishable, not any act done under it. Naturally this principle is offensive to militant labor (though it applies equally to combinations of capital or employers), there is no change in the common law that the late Samuel Gompers had so much at heart; and his party succeeded in getting it abolished, in England, in all disputes affecting labor (which is probably unconstitutional as being "class legislation" in our country), though he attempted in vain to get the law modified with us.\* Were this great principle done away with, our government might soon prove powerless as against any great combination though it were acting extra-legally or even against the law. This phenomenon we are seeing in England to-day (1926); and if parliamentary government surmounts it, it will probably be by applying the extraordinary (with us unconstitutional) powers given it by the "Emergency Act" of 1920.†

The law of Association (as continental writers use the term) is, in brief, that men may assemble or meet together freely, either to address the government or to concert upon political measures—we usually call it the right of petition, or of assembly. It is guaranteed in all our constitutions. For want of it, the liberal classes used to say in Russia that reform there was impossible. Where reform is impossible, revolution is necessary.

But the word *association* is also given, in continental legal writings, to any right of combination, economic or social,—

\*The attempted modification failed in the Adamson Act of Congress, only Maryland adopted the statute Gompers desired. Arizona attempted to exempt labor combinations from injunctive control, but the U. S. Supreme Court held the law class legislation and therefore null.

†I leave this as written, as the prediction was verified.

labor unions, even clubs; strikes or boycotts; lockouts or trusts; "gentlemen's agreements" or cartels; in short to any concerted action or possession or employment of either.

A far more important and significant thing than individual action to better one's own condition is the combination, either of men or of capital, be it of "wages' fund" or productive plants, to obtain, at first, economic results, but finally, as we now see in England, governmental power. Hence the danger, in modern times, of the *imperium in imperio*; a peril which Greco-Roman civilizations, not being industrial, did not have to face, and which its defenders indeed claim is directly and necessarily the result of the capitalistic system (but this can only be as to its economic side; the same thing exists politically, as for instance the Ku Klux Klan to-day, or in earlier times, free-masonry, or still earlier the Jesuits, as against the government of the Church). It is a problem which empires or monarchies as well as democracies or constitutional republics had and have to face, though assuming a more menacing aspect in the latter, as the government is restrained by a constitution and is deficient in arbitrary force, while dependent, for its action, not upon an autocrat's will but on a vague and uninstructed public opinion.

It took the genius of a Napoleon to recognize, as with a quick and natural eye (not yet usually possessed by our press or publicists or law professors), the enormous advance that English law had made over all its predecessors in recognizing, by criminal or restrictive laws, themselves based upon earlier customs or court decisions of the *jus dicendi* nature (i. e., declaring, not making—judge-expressed, not judge-made) the enormous power, the public menace, of association, not by constitutional political methods, but by "direct action," against the government or the liberties of the individual. Association may of course range all the way from legal political combination or right of assembly, to treason;

from simple association for business purposes to an illegal trust or monopoly; from a legitimate Union effort to raise its own members' wages to an unlawful boycott or conspiracy against the rights of others not concerned in the dispute, or even against the state; from a Kiwanis club to a K. K. K. or a Mafia; its principles govern all human activities that a man exercises in concert with other men. It may rise from an attempt at some economic control of individuals to an attack on the government, revolution, civil war. It is not too much to say that the future of democratic government will mainly depend—granting it respects cardinal individual rights—on its handling of this great question.

Yet, though darkly obscured by legal pedants of too narrow a way of thinking (for the rarest of human attributes, even among the educated, is readily to comprehend, to feel the *portée* of, great generalities) who call the law of conspiracy hard to explain or understand, or, in the eyes of the labor leader or trust magnate, to defend, its principles are really as simple as the moral law.

Forty years ago the common law upon this subject had been almost forgotten. In the prosperous America of agriculture and commerce it was not necessary. And our lawyers began to have no historical training (unlike their revolutionary predecessors); what remained of it in their minds was only the *criminal* law of conspiracy, and even in that narrow field regarded as mysterious and technical. The early English statutes were unknown; as late as 1904 there was in no American law-school any teaching of historical English law. Of course it is true that "democracies care nothing for history because they want to experiment"; but still, schools of learning should teach us how to avoid again venturing down old false roads. But that is why most of our anti-trust legislation, the Sherman Act included, and much of our legislation in the matter of labor disputes, is confused, clumsy, and

nearly always either unnecessary or unconstitutional. In England, the very basis of this common law was changed under Gladstone by an Act of Parliament exempting labor entirely from the common law of combination (38 & 39 Vict. c. 86): "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." No American State save Maryland has gone so far as this, though both New York and Pennsylvania attempted to define the law as to strikes, which however were always lawful in our democracy if motivated solely for the benefit of the strikers themselves.\* This theory, that *the law of the acts of one should be identical with the law of the acts of many*, of course upsets the whole common law of Association. It is true that the English Act says that "Nothing in this section shall affect the law relating to riot, unlawful assembly, breach of the peace or sedition, or any offence against the State or Sovereign"—whatever that may mean. It is probably under this proviso that the present British government is now (May, 1926) claiming that the present general strike is unlawful.

Yet Mr. Gompers never succeeded in getting this revolutionary statute adopted with us, though he professed† never to be able to see why a few men should be punished or be liable, even in damages or to injunction, when no one of them *does* anything that is criminal and even the combination intends no *crime*. Nor could he, as an Englishman, understand that the Gladstone act might be impossible under our Con-

\*The statutes, both of England and our States, will be found summarized in the U. S. Industrial Commission Reports, Vol. V, pp. 129-134; Vol. XVI, pp. 166-171.

†In debate with the author, before the National Civic Federation in New York, *circa* 1907.

stitution. The answer is, in logic, the tremendous power of *combination*; in history, the whole course and origin of English law; in morals, the fact that of all our inherited laws this one recognizes most profoundly the necessary conditions of individual liberty and well-being as well as the *principles of the moral law*. From the very earliest English statutes (which were but expressions of the customary law) when it was the danger of great men against small that was principally recognized, down to the most modern decision on the boycott or the blacklist, the labor combine or the trust, we have had the intelligence to recognize and to regulate this huge power of combination. And it is not sufficient that we punish such combinations to effect crime; we must restrain such concerted action to the injury of an individual in his trade and thence all the way up to a mortal wound given the state in its functioning,—you cannot *combine* to injure another, or the state, or the public, even *without* violence or crime. That is our great principle. You may, of course, dislike a man; you may even wish him ill;\* you may refuse to buy bread of a baker, perhaps even advise your friends not to buy bread of him; but when you call or attend a meeting of all or many of the inhabitants of the town and collectively agree not to buy bread of him, your united action may amount to the ruin of the baker in question and so be a conspiracy—i. e., an unlawful, possibly criminal, combination under our common law. So if you preach against the state, or combine constitutionally to alter its policy—it is, or was until 1918, all right; but not to preach or combine to upset it, or to disobey its laws, however much you disapprove them.

Kings can repress such combinations with a high hand; but democracies must have the intelligence to recognize that the law of aggregation, of the action of a multitude, of the

\*“A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards.”—Holmes, *The Common Law*, p. 110.



possession by many, or by a monopolistic corporation, is, and ought to be, different from the law governing a single individual. If one does not see this, it is little use to cite authority; Dicey, for instance, in his *Law and Opinion in England*, puts first and foremost this principle, calling it an exception to the right of association: "whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of which it is constituted. . . . A body, moreover, created by combination,—a natural corporation, if the expression may be allowed,—whether a political league, a church, or a trade union, by its mere existence limits the freedom of its members and constantly tends to limit the freedom of outsiders. Its combined power is created by some surrender of individual liberty on the part of each of its members; and a society may from this surrender acquire a strength far greater than could be exercised by the whole of its members acting separately; a disciplined regiment of a thousand men acting under command is a far more formidable assailant than a thousand men who, even though armed, act without discipline and combination" (p. 153). And in the appendix he says, still more clearly (p. 465), the right of this exercise of the power of association "raises difficulties in every civilized country. In England, as elsewhere, trade unions and strikes, or federations of employers and lockouts; in Ireland, the boycotting by leagues and societies of any landlord, tenant, trader, or workman bold enough to disobey their behests or break their laws; in the United States, the efforts of mercantile trusts to create for themselves huge monopolies; in France, the real or alleged necessity of stringent legislation in order to keep religious communities under the control of the State—in almost every country, in short, some forms of association force upon public attention the practical difficulty of so regulating

the right of association that its exercise may neither trench upon each citizen's individual freedom nor shake the supreme authority of the State. The problem to be solved, either as a matter of theory or as a matter of practical necessity, is at bottom always and everywhere the same. How can the right of combined action be curtailed without depriving individual liberty of half its value? How can it be left unrestricted without destroying either the liberty of individual citizens, or the power of the government? To see that this problem at the present day presents itself everywhere, and has nowhere received a quite satisfactory solution, is of importance."

The English law of combination did, however, offer such a solution. And, so far back as 1820, Dane's *Abridgment*, published in Massachusetts, tells us that the English law of conspiracy was made French law by the code of Napoleon. It is this: a combination of many, not only to commit a crime, or to attain an unlawful object or a lawful end by unlawful means, but even for a purpose ordinarily lawful for one acting alone, if to the injury of a third party or of the state—to the hurt of the public or the coercion of another in some lawful right—is unlawful, is void, is a criminal offense, and (where such third party or the public is in danger of irreparable injury) may be enjoined in a court of equity. And where it differs from all other law of private right (i. e., not criminal law) is in this: that the obnoxious purpose need be, not a *criminal* offense, but merely a *moral wrong*.

It can hardly be said that this law is the evolution of democracy; it is rather doubtful whether democracy will measure up to it. The great volumes of Statutes of the Realm begin with Magna Carta as promulgated by Henry III, 1217; although they also print the Charter of Liberties of Henry I, 1101, the Charter of Stephen, 1107, and of course the Magna Carta of John, 1216. This naturally contains no

statement of the law of combination, as it was a treaty between King John and his subjects as individuals. That law is said to be first formally recorded in the Statute concerning Conspirators, of uncertain date; sometimes associated however with the Statute against Champerty, which dates from 1305—early enough to show the respect to which this ancient law is entitled, for no statute of importance preceded that date except the great Code of Westminster I and the Statute against Mortmain.\* Cobbett, in his history of the English Parliament, makes no reference to this statute, not realizing its importance; but then Cobbett, no more than Gladstone, was a lawyer. (However much we may distrust the paid practitioner, it is certain that with our people all great movements for human liberty have been led by lawyers.) It is indeed only aimed at conspiracies with the object of maintaining lawsuits; but nevertheless it declares a crime, and the word "*engine*," that is to say, fraud, is used in the preamble, thus establishing at the start that a combination with a perfectly lawful purpose (for a lawsuit is, of course, a lawful purpose) but with the *intent* to injure someone, as by a lawsuit based on a false claim, is a criminal offense; and furthermore, that it is the *intent* that is material. "If any man be convicted under such writ (conspiracy) he is to be imprisoned until he hath satisfied the party aggrieved and paid a fine to the king"—i. e., it is both a civil and a criminal offense. It refers to conspiracy as an offense or action already well known in the law; like all early statutes, it only imposes a new and severer penalty on a common-law offense; thus, it is irrefutable evidence of what the law already was. So, five years before this, in 1300, the Articles upon the Charter, 28 Edward I, state that "the King hath provided a remedy

\*Much of this chapter is taken from an address delivered by the author to the Indiana State Bar Association in 1910. He would apologize to the lay reader for the necessary technicalities, on account of the importance of this great subject to any study of the future of democracy. The full address may be found in the *American Law Review* for January, 1911.

against conspirators by special writ." And there is no definition of the word; so it must have been well understood at that time.

So, in 1330, 4th of Edward III, the preamble to Chapter II says "divers People of the Realm, as well great men as other, have made Alliances, Confederacies, and *Conspiracies* to maintain Parties, Pleas, and Quarrels, whereby—some have been destroyed, and some for fear to be maimed and beaten durst not sue for their Right—to the great hurt of the People and common Right"—a substantially fair definition of the modern wrongful boycott. Fourteen years later comes another statute aimed against "conspirators"; then, in 1353, the first great Statute of the Staple states the law to be "ordained and established that no Merchant or other shall make Confederacy, Conspiracy, Covin . . . or evil Device . . . to the . . . Disturbance, Defeating or Decay of the said Staples"; that is to say, there must be no combination in restraint of trade at a staple town or in the staple market; and the very word *covin* implies intent. Finally, that the history be made quite complete, having already come to our denunciation of conspiracy in restraint of trade ("trusts"), we find, in 1360, the same law applied to conspiracy in labor matters; by 34th of Edward III, Chap. 9, "all alliances and Covins of Masons and Carpenters, and Congregations, Chapters [that is to say, Trade unions], Ordinances and Oaths betwixt them made or to be made, shall be from henceforth void and wholly annulled; so that every Mason and Carpenter, of what condition he be, shall . . . do every work that to him pertaineth to do, of free stone or of rough stone; and also every Carpenter in his degree; but it shall be lawful . . . to make bargain or covenant of their work in gross"—that is to say, piece work, or contract work, shall be allowed.

This early English law is indeed more restrictive of Union methods than is our modern democracy; but it is equally

severe upon capitalist combinations, and it was quite peremptory against any combination against the state or in any way impairing its sovereignty. And with true modern leniency, the laborers "were not to be punished by fine or ransom"; that is, the conspiracy on the part of the laborers was not made a criminal offense, but only null and void.

Blackstone wrote very little on this matter, and it is apparent that he did not take the pains to study these early statutes; the only form of conspiracy he discusses is that to indict an innocent man of felony. Our Judge Cooley well states the sum of the law, quoting Hawkins' *Pleas of the Crown*: "all confederacies wrongfully to prejudice another are misdemeanors at common law and indictable accordingly, whether the intention is to injure his property, his person, or his character," and "the offence of conspiracy is not confined to the prejudicing a particular individual; it may be to injure public trade, to affect public health, to violate public policy, to insult public justice, or to do any act in itself illegal. There are many cases in which the act itself would not be unlawful if done by a single person, which become the subject of indictment when committed by several with a joint design."

But if there were any doubt about the ancientness of the English law of association, it would be removed at once by the Abbot of Lilleshall's case, which was actually decided in 1221, eighty-four years before the first Statute of Conspiracy was enacted, first published by the Selden Society in 1870 and consequently unknown to Blackstone. It is a perfect instance of a modern boycott in early times, well worth being quoted in full:

"The Abbot of Lilleshall complains that the bailiffs of Shrewsbury do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, and that Richard Peche, the

bedell of said town, made this proclamation by their orders. And the bailiffs defend all of it, and Richard likewise defends all of it, and that he never heard any such proclamation made by any one. It is considered that he do defend himself twelve-handed [i. e., with eleven compurgators] and do come on Saturday with his law."

Here, in twelve lines (ten lines of law Latin) we have set forth all the important principles of the English law of boycott. The Abbot complains that the Shrewsbury people do him many injuries "against his liberty"—that is, the Abbot claims that he has a constitutional right to conduct his own business without interference by others. Then we have the recognition of the *threat* of a boycott as a particularly illegal act: "they have caused *proclamation* to be made that none sell merchandise to the Abbot." The defendants admit the illegality of the conspiracy, because they only deny the fact; and the bedell likewise denies that he ever made such proclamation or threat. Whereupon (the plaintiff being a man of the church and therefore entitled to trial by oath of himself and friends, rather than by ordeal) they are sent to trial by wager of law instead of battle. But neither party, nor the court, makes any question of the illegality, both of the conspiracy and the act complained of.

Note that in all these cases, as in the law of crime, it is the *intent* that is essential. So, in the Lilleshall case, the defendants themselves admit that, were it true that they had combined *with the intention* of injuring the Abbot, it would have been a criminal offense.

So much for the law, if not of a democracy, of a free people, against combinations. When in any way directed against the government, they may rise to high treason; as in the case of the combination of friends of Mary Queen of Scots in 1588, reported in State Trials, I, p. 143; when against an individual, they are a misdemeanor at common law and give

him claim for damages. The law of monopoly, resting also on combined action or merger of resources with a common purpose, is based on the same principles. The law against restraint of trade is pretty old; but its result, monopoly, was not particularly felt in England before the sixteenth century. Our earliest mine of information is the "Great Case of Monopolies," argued in 1684 during many months and reported in full in the seventh volume of the State Trials, p. 513. All the lawyers who were or became Chief Justices of England about that time appeared in this great case. It was brought by the East India Company against a merchant, one Sandys, who had freighted a ship for East India ports in contravention, as it was claimed, of the charter of the Company, granted by Elizabeth, which gave them a monopoly of trade to the Indies. Had the decision gone against the Company, it would have put an end to the British Empire in India. Sandys defended, on the plain ground that the grant was a monopoly in contravention of the common law of England. The Company sued for a nominal amount, £1,000 damages, no specific remedy or penalty being provided in the Company's charter, just as a man might to-day sue a "trust" which had injured his business, even though no specific damages were allowed by the Sherman Act. They won. The court admitted that by the common law monopolies, even royal charters granting a monopoly, *in English trade*, were void; but said that this liberty of trade did not extend to foreign nations, particularly heathen nations (an Act of Congress has recently made precisely the same exception as against our own anti-trust law) and that, as the Crown might prohibit *all* such trade, to prevent possible corruption of the manners and morals of England by intercourse with heathens, so the king might grant a limited permission or grant the monopoly of such trade to one person or company (precisely the same argument as was used by those of us who wanted our coastwise shipping exempted

from Panama Canal tolls—traffic between American ports being forbidden to foreign ships). Sandys relied on the old Statute of Edward (1344) “that the Sea be open to all manner of merchants to pass with their merchandise where it shall please them”;—now disavowed by England, but become American doctrine for which we fought two wars—and Holt, of his counsel, cited the case of the King against Crispe: “here was lately an agreement between copperas makers and copperas merchants for the buying of all copperas, and that these makers should for three years make at so much a ton, and restraining them from selling to others”—this was held criminal engrossing (cornering the market).

In 1375, one Peachy, by royal grant, was given a monopoly of selling sweet wines in London; he did so, and was punished for extortion (just as if it were proved that a modern “trust” sold its goods at an exorbitant profit by reason of a monopoly; and the royal grant did not protect him any more than would the modern trust its corporate charter).

The Tailors of Ipswich, reported in 6 Coke, “A Company of Taylors made a by-law to exclude taylors from exercising and using their trade within the town unless they presented themselves to the masters and wardens of the company and were admitted as members”—this by-law was held void, the court saying, “ordinances for the good government of men of trades and mysteries are good; but not to restrain any in their lawful mystery . . . [even] the patent to the College of physicians that no person shall practise physic without a license would have been void had it not been confirmed by Act of Parliament, yet this concerned not all the subjects of England and is a mystery, and the professors thereof fit to be approved by persons of skill in it.”

These historical cases are sufficient to show that our common law condemned monopoly granted to an individual, acquired by a company of manufacturers, or by a trade union,



or even a skilled profession; and the question of the *intention* runs through them all.

All this (taken from the Indiana State Bar address in 1910) while it remains true to-day—except so far as in America our Supreme Court has announced the somewhat vague “rule of reason” instead of the common-law rule of primary intention,—relates only to the relations of men amongst themselves, and hence can be and always has been regulated in English-speaking countries, by the common law. Its last and highest, but also most contested principle, the one most challenged both by organized labor and monopoly, and which alone my fairminded critics may think I have somewhat extended, is that which makes a conspiracy of the combination to effect, though by lawful means, the injury, even of a single individual, or the restriction or deprivation of his lawful rights. Yet this doctrine has just been followed in a famous case before the courts of Massachusetts where, after the longest jury trial known in English judicial history, the largest verdict (over seven million dollars) ever given for damages in a common-law court was rendered in a civil action for conspiracy against a group of bankers who, as the jury found, had combined to prevent a manufacturer in embarrassed circumstances from obtaining, from other bankers than the defendant creditors, the necessary funds for extricating the plaintiff from his business difficulties, and also thus to preserve to himself the control of his mills and other corporate properties. There was absolutely no allegation of an act in itself illegal or tortious to the plaintiff, or even of a purpose ordinarily so regarded. A principal question submitted to the jury in the case was whether the defendant bankers had insisted on having the control of the plaintiff’s mills with a primary purpose to secure economic management and the payment of their debts by the plaintiff—as they claimed—or, as he claimed, to seize the properties for them-

selves, regardless of whether the debts were paid or not. The latter was a primal purpose to injure the plaintiff, the former merely to secure the defendants' lawful claims; but, in either view, the defendants' *actions* had been the same. The test was the *first* intention of the combination.\* And a criminal case very like this and decided in the Federal courts not long before, was when the "Sugar Trust" magnates combined to lend money to a new competitive refinery, *not*, as it was found, as a simple investment, but in order to acquire control of it and prevent its ever operating.

It will be seen from these cases that a democracy—when it has, when its courts have, the necessary intelligence—may be as clear and firm in protecting the individual from the danger of hostile association as any autocratic government; probably, even more so; for the latter may be more readily induced to sanction, or even to create, a *cartel*, as was the case in pre-war Germany, a trust, a monopoly, as in the salt *gabelle* of pre-revolutionary France, or of tobacco, playing-cards or matches, in many governments to-day. And such a government's charter or concession once given is unassailable in the courts.

But on the other hand, when we come to the matter of combinations directed, not against the individual or several individuals but the "state"—i. e., the government or the people in the *collective*—the case is otherwise. There is no magic in the word "state" or even "government": an *unseen* government, a super-government, an unrecognized or subversive "government"—that is, any body of men (or women) claiming or exercising or seeking, by methods outside the recognized legislatures, political power; still more, to subvert, or undermine, the legitimate government, even when a democracy, to wrest from it, in some or in all matters, real power

\*The case was reversed on appeal, but only on the ground that there was no evidence of *concerted* action; the law of the Judge's charge was not criticised.

or control—becomes in fact and reason as much a government as the recognized one. Such things happened even under autocracies—witness the Mayors of the Palace, the Shogun, the Mafia (we will not count military combinations ending in dictatorship or expulsion of the legislatures, as by Cromwell or Napoleon or many Latin American republics today, but only those which went on while the legitimate government still pretended to exist), associations nominally extra-governmental, pretending to exist under it but which really control it, or which have a greater power on the people. There is no magic in a name; such bodies of people, acting together for a common purpose continuously, are just as much a government as if they were called so. For instance, no one would deny such power in our Anti-Saloon League. Usually strongly repressed—as were Free Masonry and the Jesuits—by an absolute government, representative or direct democracy seems more powerless to handle them. Yet who shall say that organized labor, in England and with us, does not have more real control over the economic life of the people than the Federal government? or the “trusts” over manufactured articles, or the prices we pay, or the tariff? that the Ku Klux, or the K. of C., or (if they tried) the Elks and Rotary clubs and Kiwanis combined, might not get to more real power than Congress and the President? that the Constitution may not be transformed—the very fabric and loom of our American government—by socialists on the one hand or bolsheviks on the other,—or by a united woman’s party;—even its very existence as a representative democracy, instituted primarily to protect cardinal rights, subverted? And this, not by ordinary legislative process, or constitutional amendment, or even by the repealing of the Constitution; such political association would be legal—although, in the hysteria of the Great War our courts nearly held it not so—but by extra-legal association, ranging all the way from Fun-

damentalist societies against evolution to the wonderful government of the crime-world—its judgments are executed with a certainty, its obedience exacted more implicitly, than is the case with the national government itself.

Association, even against the "state" or government, must be tried by the same rules as ordinary conspiracy. Is it directed to the injury, moral or material, of the government or people as a whole? Democracies have not the power—and they show little tendency—to put such associations down, even when unlawful. Perhaps it is as well. When the plain man sees that any such combination is "bigger than" the government, it is hoped that he will arise and squelch it. Otherwise democracy will come to an end.

Our modern democracies, in handling these questions, have proved, as might be expected, more anxious to control combinations or monopolies made by capital than those made by labor; indeed, they have sought to do away with all restraint of labor combinations and have, in England, nearly succeeded. Yet logically the same principles ought to apply to both; while it is obvious that a combination of men is more menacing to other men and more dangerous to the state than a combination of things—money or capital.

More than on any other, on its handling of this great question (with that of liberty in general) the future of democracy depends. Property may in some conceivable civilization be denied the individual; but not his liberty or his livelihood or the state its supremacy. Yet on this matter our courts are still floundering. Instead of the simple test of intent, they are often led to consider the *effect* or the *result*; that is to say, if the *result* turn out to be monopolistic or otherwise against the public interest, that will render the combination unlawful from the start. Under that rule, no employee and no manufacturer or trader entering into any agreement with another can tell whether he is in a criminal conspiracy or not! Fur-

thermore, under the test of complete monopoly, it is probable that none could ever be successfully attacked in the courts; the older New York law was based upon this notion; it provided, in effect (for, being a criminal statute, it had, under common-law rules, to be construed strictly) that when any combination brought about a monopoly, that is to say, an actual or complete monopoly of a trade in the State of New York, it should be held an unlawful trust under the New York statute. As it was obvious that no trade company ever did so succeed, not even the Standard Oil, in getting a hundred per cent monopoly, that test proved a failure, and no person or corporation was ever convicted under that law. The question of complete monopoly or ultimate effect is really material only in that it shows up the intention of the combiners, or, more lately, the Company (for the effect of our national "Sherman" Act against "trusts" was to compel them, up to that time usually combinations or agreements of several, to fuse themselves into one corporation). I may, even with one or more associates, obtain a 100% monopoly and still be within the law; or on the other hand, if I combine with them *for the purpose* of restraining or controlling trade, of destroying competitors, ours will be a criminal combination, though we fail in our purpose as rapidly and completely as did most of our American attempts at monopoly before the corporate form, with the holding company, was employed.

The old English method of handling this problem, by studying the *intention*, is the best. But democracy meets it, more passionately, from the labor, the human, side; "labor is not a commodity"; the one doctrine—or slogan—that our leader Gompers did succeed in implanting in our statutes. And here we approach our conclusion: will democracy have the *intelligence* to perceive the importance of all this law of association, of combined possession or combined action, and

handle it with the wisdom and the courage necessary, if the individual is to be protected against the mass and the state against a super-government? It is not obscure and difficult, as superficial critics have said, but it is certainly profound. Autocracies may possibly handle such associations more boldly, if against the government: democracies possibly will be more jealous of the trade monopoly. But in a country whose laws are ready-made by political representatives, even perhaps by initiative, of a people whose voters have a majority from the labor or employee classes, which alone are politically organized, and with the natural sympathy most men feel for their aims, it may be feared that in the vote-getting contest both such intelligence and such impartiality may be lacking in their legislation. On the other hand, the very fact that the government is their own, immediately answerable to them, ought at least to breed no discontent with such law as our people in their history have found necessary for their liberty, or our present democratic governments now find necessary either to protect the individual or to save the state.

And one more great principle must be added to our study. It is, that in all combinations, it is the immediate object, not the final end, that counts. Thus, employees strike or boycott in another industry, with the hope that it will raise wages in their own; the *immediate* object is to injure or control the *other* industry; and that makes the whole thing unlawful, although it is always lawful to strike to raise one's own wages. Two steamship companies combine, to reduce their expenses and improve their trade; that is their immediate object, and the fact that it tends ultimately to a monopoly of such steamship business does not make it unlawful.

That is why a general strike is with us unlawful *ab initio*—and probably so in England, though it has been doubted there, owing to the exception of "labor disputes" in the Trade Disputes Act of 1906 and the Conspiracy and Protection of

Property Act (38 & 39 Vict. c. 86) before referred to. A "general" strike is necessarily in large part a strike in many trades for no grievance of their own, but to interfere with somebody with whom they have no relation; moreover, as there are many public employments (policemen, navy or dockyard men, or even railroad, telegraph, electric light, etc.—what we call "public utilities") it may tend to become, and was so considered in England, a strike against the very fabric of the state itself. Sympathetic strikes, what some call the "secondary boycott," are always unlawful for the same reason, viz. that their first end is not to benefit the strikers but to injure somebody else.

This is the law; and there is a strong movement in our democracy to have it done away with. I have told how Mr. Gompers himself, in my debate with him before the National Civic Federation in New York, made a plea to have both the law against boycotts or sympathetic strikes done away with and unlimited picketing or "unfair list" publication permitted.\* In private conversation with me later, he did not deny that these things were against the common law, but said, "I can't help it. They are labor's only weapons. Without them we cannot fight." And the same may be said of the action of labor unions (perfectly lawful organizations in themselves) when they attempt to exclude others from the trade, or from learning the trade, or from working at their own wage or in their own time and still more of their desire to be relieved of legal liability for their own contracts or torts while insisting on that of those they deal with.

Strenuous efforts are being made, both in England and here, for the alteration of our inherited law in all these matters. But we—and any modern democracy which possesses them,—should think long and carefully before we abandon

\*It will be remembered that he himself was, some years later, given a jail sentence for publishing an "unfair list" in defiance of court orders—and only escaped imprisonment through the statute of limitations.

those legal principles which prevent the oppression of the individual by the combination of many or the organization of few; still more, which guard the state—the organ of our democracy—from their power, exercised otherwise than through the ballot-box. Neither organized labor, nor combined capital—both good things when controlled—nor the Ku Klux Klan, nor the Knights of Columbus, nor the Fundamentalists nor the Secularists, nor the Wets nor the Drys, nor the Bolsheviks nor the Socialists, should be permitted to rise by the power of combination superior to the historic liberty, the time-tested jurisprudence, of their sovereign—that very democratic state that gave them birth. It is not its heart but its head that we distrust—or rather its head-strength, if we may coin a word. Headstrong, democracy is fond of experiments; it cares not at all for the lessons even of our own history. It is proving a failure in Spain and Italy, because they never understood it; in other countries it seems to be in danger. It is the high duty of the more experienced democracies to teach it to think before it acts.



## CHAPTER VI

### DEMOCRACY AND WOMEN

In the savage state such differentiation as existed between the sexes was the result only of natural function or the preference of man. To women, maternity; to men, warfare; and in the rare times of peace, women must perforce do what labor man refused.

In the first stage of industrial advance the drudgery of agriculture became part of women's work, men preferring the chase. But otherwise men and women were but as human units—both indiscriminately bearing the hardships and the toil of existence.

In the next stage only it is probable that the peculiar personality of women began to be felt. Then, first, the household began to be, and its care and its demands began to withdraw women from other occupations; while for her, man's mere sexual passion began to develop into affection, and it into a general taste which withdrew women from the rougher duties of the world. In Mahometan countries it brought about a condition of slavery, and even in Aryan countries—which alone we have to consider—it led to a certain subordination of women to men. But of the direct labor of bread-winning, outside the home, women were generally relieved. Agriculture persisted as an exception in the peasant class partly from necessity, partly still from man's distaste for this new kind of work, he still preferring warfare or the chase; so we have always seen the living pursuit of one age become the sport of the next; but not a wholly illogical exception, for to the peasant's hut the croft adjoining was as part of the household. Such work was, in a sense, domestic labor.

Thus began that tendency to differentiation of the occupation, and hence of the education, of the sexes; a differentiation which has been the dominant note of civilization whether Christian or pagan, and in the most enlightened epochs that we know has but tended to increase. Greater in ancient Greece than in Troy, as the *Iliad* shows; greater in Athens than in early Rome; greater in Rome than in early Gaul, in modern England than in modern Germany; greater in the New England of to-day than in contemporary France. (We speak here of the *people*; the upper few cannot fairly be compared.) At no period is the difference of sex so marked as in culminating periods of civilization, and if in Mahometan countries it is due solely to man's desires, this is not true of Athens, of the Provence of 1200, of the Cinque-Cento in Italy, of the Paris of Voltaire.

On the other hand such periods of unification of function as the modern world has seen have been caused only by harsh economic reasons, by wars, by arrest of progress, by recessions of civilization. In the rural France that Chesterfield saw, in the England of the first poor laws, in the factory development of the early nineteenth century and the mining of coal, women have had to take up more work which, at the mildest statement, is not peculiarly woman's. At times when a country's civilization has seemed to be not broad enough to demand the greatest diversity of services; when taste for the arts of peace, or enjoyment of full liberty has failed, then humanity, both male and female, has had to fall back upon the simpler avocations of a lower grade of culture, and so, necessarily to overcrowd them. Especially is this true of a period when machinery has multiplied and cheapened the goods which satisfy the coarser needs of man (a demand always limited to the amount adequate to simple satisfaction)—grain, metal utensils, the ordinary demand for clothing, for building materials, when there is coincident no advance

in the public taste for works of art, for the product of a higher culture or of finer services rendered by a higher character or a culture more complex. This must be carefully kept in view when we are considering modern democracy, especially when confronted with economic distress or when we seem occasionally to find democracy going down-hill.

Thus began the study for this chapter written in 1890-1893 (which a leading magazine bought, but never ventured to publish!). It will be interesting to follow it on; for in no matter has our Saxon (and Scandinavian) democracy made such utter and rapid change. What evolutionists call "conso-cial" evolution has acted more suddenly upon the position and function of woman than in any other manifestation. In those Spencerian days, we concluded, first, that the position of women had been highest, also freest, at periods of greatest civilization; second, that, at least from the primal savage state *until now*, the greatest *differentiation* of function, if not of nature and education (we all know that the difference between the male and female character and physique is greater with us than with the lower negro or savage tribe) has characterized such eras of highest civilization. As the segregation of private property, whatever improved system the future may have in store for us, *historically* marked the first step from savagery, so, coincidentally, did the specialization of the sexes to other differences than those enforced by merely physical reasons.

In savage times, men and women were, in all but physical respects, equal; *condegraded*, if one may coin the word. With growing civilization, men naturally got the start; but afterward, one may almost tick off succeeding civilizations by their place and scope for women. One may roughly say that Greece first gave woman mind, Rome freedom, Christianity a soul, the feudal system power, Provence the reverence of men, and the nineteenth century industrial liberty and prop-

erty. The twentieth has given political power, a direct share in government; not merely the power of property or influence of rank—Rome gave one, the Dark Ages the other—not alone the power that springs from their influence over men, that they always had—nor the power over family life, domestic love—that marked the individualistic civilization of yesterday—but the literal power of the ballot, of administration of office, of legislation, of judicial decision. And an organized “woman’s party,” now with us, wants to go the logical limit and compulsorily equalize the sexes in all particulars (so far as statute can do it), to carry the “single standard” to its extreme; there shall be no boundary between the sexes, no special protection, as well as no burdens, placed over women. But however democratic be a unification of function (is it truly that?) it does not necessarily seem the best. And if not, an intelligence to avoid this last step may yet overtake democracy before it is irrevocably taken. We took the political step suddenly, unthoughtfully, under the shock of the World War, partly, in England, because they were worried into it. But it is still not too late to study results; particularly, in so great a change as this, as the *social* consequences, to our present civilization, to humanity at large, will be very slow in coming. A century is not too long a time to expect for their full consequence to appear.

The first effect will be shown in legislation, then in administration, then in manners. What will the lawmaking of women be? Quoting from the 1893 article:

“In a code of 2138 articles, covering the laws of all our States, I found, in 1890, 267 given to woman and her relations with man, more than 10% of all our legislation. We may broadly state the result to be, perfect freedom of occupation, perfect autocracy by woman’s self of her property and her person, and free contractual relations, exercised without the husband’s consent; general and increasing liberty of divorce, coupled with equal power with the husband over the offspring of a dissolved

marriage; a tendency to regard marriage solely as an ordinary contract and hence dissoluble by mutual consent. A tendency toward the 'common-law' marriage, i. e., to regard a marriage in fact as a marriage in law, however brief the relation. But all this is after all non-essential, in that it does not touch the *status* of the sexes."

Up to that time, even now, all our lawmaking has rarely touched this question. Freedom, of person and of property, has been granted so completely as to make curiously out of date the most recent demands of the emancipators of women; but to say that a woman *may* work, gain, demean herself like a man, is very different from saying, directly or indirectly, that she must do so; still more, that she may not be protected by any laws which do not equally apply to men. And of all these thousands of statutes, those which of necessity alter the life of women (leaving out for the moment their political life and suffrage) are few enough to be enumerated. For examples: the Constitution of California and the laws of Illinois already in 1893 (and since then in many other States) provided that no person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation or profession. The effect of such laws was since curiously shown in a way possibly not anticipated by the women who favored them. In Illinois an eight-hour law applying only to women was declared unconstitutional, substantially on the ground that, being now placed on an equality with men, they must take men's responsibilities and make their own contracts. And in California a still more unexceptionable statute that women might not be employed as waitresses in saloons where drink was sold at night, though passed only to repress immorality and on the ground that such an occupation was unfitted for and demoralizing to women, was held void by the California courts, which declared expressly that a vocation, even though immoral, could

not be prohibited to one sex alone.\* And the same view has finally been taken by the Supreme Court of the land, holding, in 1923, that a minimum wage could not be prescribed by Act of Congress for women in the District of Columbia (see above, pp. 105, 108); and that the previous opposite decision in an Oregon case must now be reversed as contrary to the suffrage Amendment; women could no longer be legislated for as "wards of the State," entitled to peculiar protection or subject to peculiar restriction in such matters.

The Wyoming constitution provided generally for political equality, as did those of the original five "suffrage" States; all such constitutional provisions have since been washed away by the general flood of the Nineteenth Amendment; it does not however apply to holding office, still less to private employments; and the Wyoming provision (and of many other States since) applies to "all civil, political, and religious rights and privileges." Yet oddly enough Wyoming was one of the eight States which by their laws declared that "the husband is the head of the family and the wife is subject to him." He is bound to support the wife; not, commonly, the wife the husband. In New Mexico "he owes her fidelity, favor and protection; he should make her a participant in all the conveniences he enjoys, and should show her the utmost and every attention in cases of sickness, misfortune and accident." While he may not abandon her, she is not obliged to live with him. But in California, Louisiana, and Ohio "the husband may choose any reasonable place of residence or mode of living and the wife must conform thereto." And at common law, not usually changed by State statutes, he is liable for her torts, but she is not for his; and the same rule applies to debts. Very generally, they are now given equal rights to the possession or guardianship of their

\*So, in New York, a law prohibiting the employment of adult women between 9 p.m. and 6 a.m. was in 1907 held unconstitutional in the State courts.

children, upon divorce or even during marriage (though, of a committee of two, who is to determine?). And commonly, a woman may not be imprisoned for debt or on civil process. She is not required to serve in the militia, nor to labor on the roads, nor, in most States as yet, is she liable to jury duty.

A woman can transmit inheritance to her illegitimate child in most States; and North Dakota has declared every child to be the legitimate child of its parents, and entitled to all and the same rights as their legitimate children—this will of course let in the *recherche de la paternité*, until now always forbidden by French as well as English law; and the consequences will be very curious.

The great legal changes here summarized—entire freedom of person, property, occupation, and contractual relation, equal control of children,—all brought about before there was any woman suffrage—are a special work of democracy, and generally recognized as good. Yet they may have their drawbacks. Industrial freedom is good in theory; in practice, it might drive women from the fireside to the factory. Lady Dilke, in her preface to a book upon "Women's Work," speaks of "the enforced labor of women and children, who are encouraged to a suicidal rivalry with their husbands and fathers in the labor market" and says "those who encourage our women to treat men as their rivals, and by their competition persistently to reduce the earnings of men, are doing their best to aggravate this state of things." The wages of the husband and father being reduced, the wife and mother must needs turn her back upon her home, and give her working day to make up the difference. In this way the homes of our working classes are too often destroyed, and the health of future generations sacrificed; and we recall Ruskin's cry against the retroactive tendency of those who would have women "shriek for a hold of the mattock themselves." It is hard that a single woman should be de-

barred any means of earning bread; yet, were Ricardo's theory of the wages-fund to-day true, it might be argued that if, say, it were \$300,000 in a town of 1,000 men, they would all get \$1 a day apiece; if the women went in, the wage would be 50 cents; a married couple would get no more wages than before, and the wife taken from her home duties and her children; if she do not work, the household gets but 50 cents, while the man and his mistress still earn a dollar; there is a premium given to the unmarried, to the immoral, to the childless; and next, morality itself goes, as we have hitherto understood it; for you cannot eliminate from the problem emotional needs; the men and the women will come together; all model single-sex lodging-houses in factory towns have proved a failure. If we are to recognize but individual units, not man-and-wife, not the family (and this is what is urged by modern "emancipators"), the fittest will, in a purely industrial order, survive. And the fittest, economically, in a civilization of mere industrial units, is not the man-and-wife, but the man and woman who form no permanent relations, are handicapped by no family, no home burdens, chained by no domestic duties, with no permanent surroundings, no home.

The fallacy of this line of argument may of course be that there is no such fixed wages-fund, and that the vast diversity of occupation offered by modern inventions, modern habits (the telephone, the typewriter, etc.), and generally our expanding richness of civilization, does away with any possible theory based on any definite industry in a place whence the workers cannot escape. No such condition exists in the modern world. This is perfectly true. But the social consequences, the hygienic consequences, of the general labor of women and their competition with men in all occupations are not so easy to escape from, nor to forecast. As we have said, a century at least will pass before the world shall encounter



all the results of democracy's great woman-movement. For this is perhaps the greatest thing that it has done; and it has not been done or would not have been, in autocratic countries, save in so far as they have seen themselves obliged in self-protection to follow democracy's example.

Custom, tradition, may again prove stronger than statute and prevent the law from becoming the fact, as it has so often done before. All industrial competition shall in theory be free between the sexes; but it may not turn out to be in the same industry. If so, man would probably profit by it; for after all, his labor is, and will remain, intrinsically more valuable. Man was once proud, and is probably still willing, to support woman; if she insist on calling that a "parasite" rôle, he must compete with her. Capital buys labor at the cheapest price; the wages of both sexes will fall; but women will suffer most. She may, we may, legislate against it; but it is difficult to enforce such laws, even in state-employment, such as public-school teaching.

Women are beginning to recognize that home-keeping is a profession, a public service as well as a private, as is child-bearing, *vis-à-vis* to the state; they demand state insurance against motherhood or at least public compensation. There is an inchoate movement for salaried recompense to the wife for housekeeping, if not while the marriage lasts, at least, on its termination, whether by death or divorce; in England there is already government pension for widows with a family.

There is probably no conservative left who now opposes woman's entire industrial liberty, so far as the law is concerned; but there are doubtless fine old crusted Tories who fear that when all society has passed through this, man's wages may be reduced and woman's halved—we already see that this is not the case—and still more are concerned for the social consequences, when home instincts may be lost, and

men have learned to recognize in women only a cheaper competing laborer; when they have elbowed against her, in the factory or the workshop, not only in a few cities but in all the land; on the field, as well as in the city shop or counting-room, even finally in the political caucus and on the platform. And if wages ever fall so that women alone cannot support themselves and are driven each one again to seek some aid from some man, they say she will come to him not under more favorable circumstances than under the former home-making relation, not *more* as an equal than she did in olden days, but, if she seeks his aid permanently, more like a slave; if temporarily, less like a wife.

Experience is rapidly dissipating these fears. Our democracies, English, North American, French, Scandinavian, are getting used to woman's industrial freedom. And custom is again proving stronger than law; women are neither generally in the administration of government nor in those vocations where the greater strength, the coarser fibre, of man prevails. But this much of the reactionary's fear may be true: democracy has not yet learned to build an economic life where for most women and in most directions this very industrial freedom may not be needed. Our civilization must be richer, our culture more diverse; specialization, diversity, not homogeneity of function, must be the hope of those who, seeing all the danger, would not draw back. And however high our progress grows, and art, and skilled nursing, higher human service and vocations not yet even dreamed of by our science make ever and ever possible still higher specializations between women's work and men's, the sincere social student, be he publicist or philanthropist or physician, may yet doubt if a higher social service can be found for most women than God or nature has created for those beings "who bear from generation to generation the treasure of human affection"—and have done so since human life began.

But if on industrial emancipation we had some lingering doubts, on woman's educational emancipation we can have none; only again questioning whether it should be precisely assimilated to man's. Our democracy has certainly tended that way, but it may be because it is the only kind of education with which man himself is familiar. Similarly it has shown a tendency toward co-education, particularly in our West (not at all in England or France)—perhaps we now detect an eddy in the opposite direction. But these matters are so universally discussed that they only need mention. The primal work of democracy, before industrial freedom, was to give free education, and to women or girls equally with men or boys. And never was the state concerned in this until American democracy arose; there were charitable foundations, but few even of these were schools for women. Dr. Mary Jacobi, in her address to the New York constitutional convention (1890), stated that the earliest date she had found for a public school supported by public funds was at Hartford, Connecticut, in 1779; but in Dedham, Massachusetts, there is a stone tablet commemorating the establishment of such a school before 1662; and in its town records (which are complete since 1636) I find this page:

"17 of 3 mo: 1652, Assemb. Fra. Chickering, Lieft. Fisher, Pet: Woodward & Elea. Lusher . . . to be posed whether the Town require that girles should be taught in this Schoole or not."

All honor to Chickering and Fisher and the others who taxed themselves that year £19 3s. 5d. to pay Master Jacob Farrar to teach "to read English and the Accidence, & to write, and the knowledg & art of Arithmeticke". . . to girls as well as boys. The result of this modest beginning is familiar to all. But outside of the normal schools specially designed to train women as teachers, our public education has

very little specialization based on difference of sex; while that hypertrophied side of our general schools and colleges, which is competitive athletics,—men's games,—has been taken over, *tal cual*, by the young women. Yet it is in this direction that future progress is to be desired; just as democracy, as de Tocqueville pointed out a hundred years ago, must give more attention to the higher education, and seriously, not rest content with a smattering of Chautauqua or easy lecturing, if it is not to go down-hill.

First, liberty of teaching and free schooling; then, choice; and enlightened choice may yet come to select those colleges which tend to accentuate sexual differences of talent rather than to unify them. In the industrial last century, with its narrow scope of employment, when young women in the common schools sought education, to support themselves when leading single lives, it was well to give them just such instruction as enables a man to earn his bread, at most, to qualify them as teachers. But, as more women come to seek the higher education, since the majority after all will end as wives and mothers and have higher, other duties than self-support, it will increasingly be the true higher education which recognizes this and seeks chiefly to develop and train those qualities in which either sex excels naturally, and which the other cannot so well contribute to the general good of humanity. To take an instance for its very triviality—the voice. Few will deny a sweet one to be the higher quality in woman, the more valuable for her to possess; while a leather lung is useful to a man in a political caucus; even when woman goes into political oratory, her gentle voice is the more persuasive. It will always be the woman educated as woman whose knowledge is necessary, and who has the greater power, to improve the world. Woman must give what man has not. Few would deny that military training in a boys' free school may advantageously be replaced by hygiene and

nursing in a girls'; and from this simplest of propositions we may go on with advantage to a similar differentiation even in the higher branches. The knowledge, the science, must of course be the same, as truth is; but the art may be different; we already see simple examples; industrial or mechanical arts in boys' schools give way to domestic or "artistic" in girls'; creation, composing, to executing or acting; philosophical speculation to practical sociology; and the simplest and oldest has not left us,—indoor as against outdoor work. Perhaps only in exact science and in the mere cultivation of the mind or æsthetic sense without ulterior practical purpose, in history, literature, language, and social or political science, should the instruction given the two sexes be identical. And indeed, now that women vote and hold office, govern us, a generation before was not too early to begin the training in economic, political, constitutional history, lest, like a child with a new toy, they break it before they understand its mechanism. This understanding they never got. And certainly, in the history of the English-speaking peoples and of their long struggle for liberty, the education of the two sexes should be complete—and identical.

So far went our words in 1893. Since then, but only under the excitement of a world war, the sudden step was taken which Bryce, the latest of democracy's great prophets, declared to the writer, as late as 1920, to be "an epochal blunder"! Anyhow, the step can have no retrocession; and we accept it hopefully, as a very keystone of modern democracy, save only in France, that curiously most individualistic yet most administered, most radical yet most traditional, most intelligent yet most slow to change, of all our great democracies. Yet surely one may respectfully urge caution on our female fellow citizens. But when we address to them whole books upon this subject, our constitutional history and its message, they do not read them; for, as one woman said to

one such writer, "I thought it was a lawbook"! The very reason she gave justifies our apprehension.

France, in this matter, is conservative, save for secular divorce; women have no direct political power, and nowhere is the family unit so strong. Sweden and Norway, and now Germany, in divorce and "feminism" generally have far outstripped Protestant England and Catholic Belgium, both the latter held behind by their Church. And finally the reader must ever bear in mind that the radical revolution, both as to liberty, property and sex, has here been tremendously restrained and guided by the extra and unique device of a fundamental law—the Constitution, protecting the individual against the Government and controlling the lawmaking power—an inhibition upon impulsive change, a bit and bridle put by our democracy upon itself. But the most cursory observation will convince us that women are peculiarly impatient of this. They will cheerfully change the Constitution whenever it crosses their path. They have no fear of a bureaucracy; quite the contrary; and they love centralized power. Any immediate end which is worthy will to them justify a revolution in our system of government. If the national child-labor amendment failed, it does not prove that their point of view is changing; there was a fortuitous combination against it, of vested interests, intelligent students, and the Roman Church!

When we come to direct political activities—thrusting the direct burden of government also upon women—most of the discussion of the years which preceded it seem still beside the point. Whether Bryce was right in thinking it a terrible mistake, or we survivors were right who did it, does not, in its most important aspect, depend on the arguments then used. One grew weary of them then; at best, they were mutually destructive. Logically, the suffragists made out their case, if one could be restricted to a *priori* argument and de-

barred from considering the known past, and still more the unknown future, and its probabilities. Historically, the movement to give women their equal share in direct democratic government, the ballot, grew out of our abolition movement. In all Mary Wollstonecraft's diffuse magazine of argument, complaint, invective,—she who a hundred years ago first wrote of women's rights—there is no word of voting, or that the denial of the right to vote for members of Parliament (the only national office for which, in England, men can vote) was considered an oppression. The suffrage movement started almost accidentally, in America; engendered solely by the women abolitionists' desire to plead that cause in public. Mrs. Jacobi, in her *Plea for Woman Suffrage*, said, "Who can silence the voice of woman when she is determined to speak, and still less when she really has something to say?" and she demanded for women now "to take among the powers of the earth the separate and equal place to which the laws of Nature and of Nature's God entitle them." But the laws of nature have nothing to do with the ballot, and point rather at the survival of the strongest than equal rights. In 1840 an English anti-slavery convention denied a reception to Mrs. Stanton (her husband also a delegate) on the ground that "all public function for women is in defiance of God's ordination." Dictum for dictum, the Argument from Nature (the capitals are Mrs. Jacobi's) may be considered drawn. What we have now to consider are only the human consequences. The question is not whether woman's suffrage will *presently* improve humanity. The ballot is but a contrivance, recently invented, by no means certain to be permanently employed, in the art of government; at most it was made for man, not man for the ballot. It is but a superficial view to argue that women should vote, furthermore, for the reason that the average quality of the voting will thereby be improved; though of course more common-sensible than the

argument from a supposed natural or even political right. It is the practical social result of modern democracy based on universal suffrage we have to consider.

Accepting it fully therefore, will it lead democracy on a new way? Is there any danger that it may lead us a wrong way? Universally men do women the compliment of believing that they want the right; what is moral and good, for the multitude at least,—perhaps they are more unmindful of the individual, or the state, as well as of the proper means of achieving their good ends. But we of a democracy, a free democracy, not wishing to be a socialistic republic or a government of soviets, should be alive to one thing—due to no conscious fault of women, but to their nature itself as well as uncounted centuries of heredity and training; for whether or not we inherit acquired characteristics, women certainly do inherit the qualities of their sex. That is, that women have never had the sense of civic liberty.

If we call to our mind the struggles of our own race, we find (leaving out things of religion, as they *must* be left, from the plane of mere rationalism on which our study must be based) that the two thousand years of Saxon, Norman, English life have been occupied with, and that men have labored, learned, and fought and died for, one thing principally—the freedom of the citizen: freedom, primarily, of person; then, subsidiarily, of property, labor, contract, speech and thought—that is all. To how many, even of American women, do these words, commonplace, unrheterical, at once convey the connotation of fifteen centuries of British liberty, of the struggle and the world-work of our race? How many women, even educated, would iterate the phrase unmeaningly, or throw it aside as a dry law-maxim, or condemn it lawfully for its material savor—property, labor, contract—on earth beneath those soaring stars where they would lead democracy.



Not many men either, you would say. True; but more than women; more, I fear, in 1776 than to-day.

We should remember that the growth of an heredity since man emerged from the savage state has here to be overcome. If it be true—as the extreme feminists allege—that woman has never had civic rights herself, how can she suddenly learn to respect those of others? Mrs. Jacobi said, she had been taught not to value them; her attention diverted by toys, adornment, adulation, at best by affection and her domestic duties; this birthright of any freeman has been withheld from her. How then can we expect her to wield this sword of civic power fairly, with a cold impartiality,—to prize those other treasures of freedom whose cost in blood of old-time heroes she does not know? to keep that old lamp whose light has led men's steps to liberty and made them shun those by-paths (be they ways into mire or short-cuts to perfection) wherein liberty is lost? And this liberty we had won was to be free of mob as well as king, of parliament as well as Star-chamber, of the will of majorities in life's essentials as well as of the whim of magistrates—even free of a written law itself when contrary to the Constitution or even those unwritten fundamental principles whose spirit it breathes and which are the birthrights of our race. They lie in the heart of every thoughtful American, beyond all price, and beyond any bribe of a present advantage, even when, for a moment, they may seem distasteful, to be only stumbling-blocks in our way of progress.

If these things are so, we see how the political result of woman suffrage must be sought for in great generalities rather than concrete instances,—women do not easily think in generalities. And very few, even now that we have had the suffrage some years, have learned to care for a constitutional question.

The last page is taken bodily from this chapter as it was

written, but never published, in 1893; and I then went on:

"As her mind now is, would she not have a mind to keep a sot from his grog-shop, though the fabric of the Constitution crumbled in the process? Has *she* any experience of the dangers that result from the oriental system, *cadi-justice*? In affairs at least she has talent, rarely genius; (to use Goethe's great definition) she sees the individual in the general, rarely the general in the particular. If a boy step wrong, she takes him by the shoulders and sets him right; if a man go wrong, she takes him by the heart and sets him right. In both cases, she *compels*. Her own whole experience has been one of compulsion. She has no fear of force bills. But the world (at least the democratic world) we had not thought would grow that way.

"Liberty to be, have, and say, what we will, to meet others as we will—perhaps even liberty to go to the devil by what road we will (short of crime),—well,—and if? That has been English-American liberty and is surely not inconsistent with the Christian religion. 'The moment you take away liberty, you take away half of virtue,' says also Socrates. And the other half is not *virtue*, only *good*. So without liberty, you have no sin, only evil. But we trained our women that way for long ages. They have been told, not *you must will not*, but *you must not*. They were against populism at one moment because (their minds intensely practical) they apprehended a loss of wages; so they have been against a high-tariff law (not because it is class legislation or tends to corruption in politics) but because it raises prices. They have shown an unlimited belief in prohibition alone. And that, perhaps, not only of alcoholic drink; they are born prohibitionists, to all, of what they themselves dislike. The tyranny of mediæval trades, restraint of travel, residence, diet, regulation of dress (?), undue taxation (if for a lofty purpose), condemnation without due process of law, search without warrant—how many of these historic bugbears are really antipathetic to women? The right to bear arms, liberty of creed, denial of government for private or partial good, rights of arrest of the person and public trial, denial of titles and privilege, uniformity of law, the separation of the departments—how many of these hard-won principles of our civic society are cared for by the general, even of our better educated women? How many, even understood? . . .

"Immediate expediency is not the only consideration; nor does a present good intention make up for a sacrifice of civic prin-

ciple; or an enforced reform, for an arrest of character growth. Democracy, after slowly in a thousand years winning liberty, should not cast away its essence [as our second chapter implied] in the effort to *quickly* grasp all the merely material advantages that it makes attainable. Now [1893] it seems to many from woman's past history as well as from her present mind, that nothing is so likely to help us to this false step as giving her too soon the suffrage."

In 1926 we would say that you cannot teach her to swim without putting her in the water! But we then went on:

"In her very virtues lies the danger. Yet it would be going too far to say that for all time the continuance of freedom depends on one half of humanity having its way, and the other having no say in the government . . . this bears only on the *immediate* expediency of granting the ballot to it. . . ."

Well, in 1920 we risked it. Probably there was no use waiting. But we have learned some things since 1893; and one is (to be later enlarged upon) that modern democracy has since then apparently gone definitely over to the *principle of control*. Hence much of my 1893 argument fails of present application. Very few faint signs appear of a new tendency to reverse the machine. But probably in these, women have not helped.

The 1893 chapter went on with a long analysis of women's political action in the then five woman-suffrage States, with a forecast of her political proclivities, based on a careful study of their legislation since they adopted woman-suffrage, and shown in tables setting forth the direction of their new legislation, and the ratio of socialistic (in the sense of state control over the individual in matters left hitherto to his free action) laws and radical laws in general, particularly as regards marriage and divorce. Now tables are always skipped by the reader; and prognostications of what would happen are of no great importance when the thing has happened. And a few years of hindsight are very little compared

with the long future that remains to foresight. And the results to the ballot as an institution are not now in question so much as the results to democratic government of the women's vote; and more broadly still, its result to humanity. And the subordination of the individual to the state in everything would indeed be a result to humanity, however uncorruptly the ballot effecting that result might be thrown. We are now considering, not what women will do with the ballot, but what the enlistment of both sexes in all its battles, political and administrative as well as industrial and social, will do with our life.\*

And so we come to the first root-question; one so obvious that no one expresses it, so old that it is even now hardly questioned, marriage. Of its history, an epopee of well-meant fictions has grown to the venerability of axioms. Women believe, and men accept, and no one thinks clearly,—save the socialists. Religion wrought this work; but even where religion has ceased, the work remains. Man has joined with the priests to “make believe it”; our civilization, recognizing property and working for the family as a unit, has taken over the religious dogma and perpetuated it as a civic necessity; in this one particular the male-governed state has suffered the word “sacrament” to have a civic life, respected the pure faith of the women, protected it and supported it with all the statutes of the state. Marriage is the one thing the laws of our young democracy admitted to be beyond its proper control; as it created a *status*, not a contract, it may exist without written law, and it may not, like other contracts, be ended. This view was well expressed by Mr. Iredell Meares, counsel for the “Sentinels of the Republic,” and quoted by Senator Overman of North Carolina in an argument in the

\*“It is a commonplace,” says the biographer of Beaconsfield, “that some time is required for the disclosure of the full consequences of a political revolution, the traditions of the old order retaining their power long after the change in the political arrangements which gave them their vitality.”<sup>12</sup>

Senate\* against the Capper bill for placing all powers over marriage and divorce with the Federal government:

The Supreme Court of the United States has held that marriage does not fall within the class of contracts the obligation of which can not be impaired by the States. The marriage status involves responsibilities, alike to each other, offspring, and society. The State regulates this status. The Federal Government has no control over it. The Supreme Court of the United States has so held. "It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." (*Maynard v. Hill*, 125 U. S. 190.)

It is unfortunate that the spiritual ideal of marriage as a religious sacrament is not more firmly and universally instilled in the minds and hearts of the people. In the degree that we abandon this ideal the evil of divorce will remain. *Loyalty in faith*, if not in love, each to the other, is the basis of its maintenance, even as loyalty is the rock upon which in final analysis human character rests.

Men have always, in this particular, for the benefit of their women and children, maintained, even in their statute law, the transcendental view: observance of marriage is a good, *per se*; its breach is not only a sin but a crime. But in our writing, we have set ourselves to be coldly rational; for the purposes of our study we have no religion, as our American state has none. Monogamic marriage, thus regarded, is but a convention, or, at most, a custom. There are five possible relations of the sexes: monogamy, polygamy, polyandry, promiscuity, and the present system,—which is practically contractual, with no state interference. The modern state, having no religious prejudices, must judge all of them on utilitarian grounds alone. In socialism, the welfare of the state; in democracy, the welfare of the individual; in anarchism, his liberty—alone must be considered. One system is

\**Congressional Record*, May 26, 1928.

as good as another, until shown to work ill by actual experiment; there is nothing pre-determined about monogamy, nothing sacrosanct about marriage. For autocracies, oligarchies, aristocracies, civilizations based on private property, monogamy perhaps works best; it conserves both property and the family; and in all occidental countries it has hitherto been favored by a state church. So among Catholics it has become part of the faith. But still, a study of democracy must regard it as only an expedient convention, not part of a creed or even a necessary truth.

But man has not in the past taken this view; and the very differentiation of sex position in the past, our civilization under which the household, not the individual, has been the unit, has enabled the structure of family life to retain its sacredness. In the hearts of women at least, marriage has been a sacrament; and the world, in our country, has been more ruled by women's hearts than may be read in the letter of the law. And all these causes have made possible, one may frankly say, the greater virtue of women; have made for them, in the material world, a higher place, have raised about each woman, at least in the happier times and countries, the shelter of a little shrine.

"If the greater virtue of women mean but the lesser virtue of men; if, when women's and men's minds are cast throughout in the same mould, all tradition aside, both absorbed in the same struggle for existence, we may hope that this companionship and competition will end in placing man's character and conduct where woman's now is"—I wrote, in 1893—"we have everything to hope from that emancipation from law and prejudice, from a unification of the conduct and the function of the sexes. We have heard much lately of 'the single standard' of morality: will this equality of sex bring it about by raising one sex or by lowering the other? or by lowering both together? Is the single standard to be what

now man's is, or woman's, or the average? Will it be Ursula's and Thekla's? or even George Eliot's or Mary Wollstonecraft's, among the richer classes; among the lower, Trilby's—the school of experience bids us not set our hopes too high. The Latin Quarter of the Paris of Murger and Béranger, the court of France, imperial or royal, the factory town of the nineteenth century, the dramatic or lyric stage, are the times or places where in our own history the sexes have most thoroughly been brought to a sameness of living, function, opportunity: and none of these environments shine by sexual morality. Actors take no part in political life, and actors and actresses have for centuries had equal social and economic liberty. Where women have literally shared the ideals, and work, and power, and ambitions, and practical beliefs of men,—we have so far had but limited experiment—one can hardly claim that (other than is imposed by nature's differences) women have maintained that *being apart*, or shown that there is likely to be very much real difference in their view and in their conduct of life from that of man's.

“Yet to anyone who holds that woman has at least some qualities higher than and different from man's—if her thought and heart (and all greatest thoughts come from the heart, said Goethe) have peculiar worth and truth and value for humanity . . . how can it be feared that she will not vote, as well as work for, the highest humanity? Why, because she is given a new lamp, must the old lamp be lost? Perhaps no answer can be given, save that this world is full of paradox. But divorce (as our tables show) is, in the main, a woman's institution. The United States Commissioner of Labor has said ‘contemporaneously with the agitation for what is called the emancipation of women . . . the independence and the social and legal equality of women, there has been a decrease in marriages relative to the increase

of population, and a very large relative increase in the number of divorces granted.' ”\*

“It is not *what* she will vote alone, but the *effect of her being a voter* that we have to consider. . . . As to the measures she will vote for, undoubtedly the first effect of the suffrage with us will be to give a great impulse to prohibition and strict enforcement of moral laws. . . .”

So far we hazarded prophecy in 1893. And we then observed that, in our States, statutes relaxing the law of property, imposing restraint on personal liberty, relaxing the stringency of marriage and divorce laws, usually rise and fall together. Of course divorce is the very creature of democracy. Before modern democratic states began, divorce was granted only by the Pope (under the pretext that the marriage was null *ab initio*) or later by the sovereign power; in England by Parliament, in the colonies, as still in Delaware, by the legislature. For democracy is essentially a civilization of contract, not of status. The government of the Massachusetts Bay was the first, after Scotland, in the English-speaking world, to “provide for the relief of marital misery” by divorce. Zurich, under Zwingli’s influence, made provision for divorce in 1525; Lübeck and Goslar in 1531; Lippe in 1538; and Geneva in 1541, the power of Calvin being then supreme in that canton. Similar provision had been made in most of the Protestant states of Europe, but England still adhered to the doctrine of indissoluble marriage, notwithstanding the divorce by Parliament of Henry VIII. In 1552 a revised code of the canons embracing provisions for divorce failed to become law, though approved by Archbishop Cranmer, Peter Martyr, and other men of eminence under Edward VI. The first Massachusetts act authorizing the dissolution of marriages by judicial decree was passed in 1639. In the same cen-

\*Thirty years later, we find that the number of marriage licenses granted in Boston, with an increasing population, fell from 9,674 in 1923 to 8,051 in 1928.



tury several divorces were granted in Connecticut, usually for desertion; in 1670 Hannah Huish, "having declared that she had not heard from her late husband, Thomas Huish, for eight years or better," was declared to be at liberty to marry again "as God shall grant her opportunity."

There were, in 1893, six States which had adopted or favored woman suffrage (not counting those like Massachusetts which allowed her the vote on matters concerning the schools)—Colorado, Kansas, Nebraska, Montana, Washington and Wyoming. It will be noticed that these States were strongly American in stock; other far-western States, though they have since proved still more radical, had not adopted it, the Dakotas, for instance, probably because their settlers were largely European, Scandinavian or German. In these six suffrage States the average number of causes recognized for absolute divorce was then  $9\frac{2}{3}$ , say 9.66, ranging from eleven causes permitted in Washington to eight in Montana; in the other thirty-six States the average number of causes was 7.36, ranging from fourteen in New Hampshire (strongly American and democratic; the French-Canadians then rarely voted) to one in New York and none in South Carolina. (The computation was based on the Report of the U. S. Commissioner of Labor for 1889, and Territories were excluded.) So we found a greater number of causes by one quarter allowed in the woman-suffrage States than in the rest of the country. The number of causes is of course not conclusive; we now well know that New York, with its one cause, sees probably quite as large a proportion of its citizens divorced, in the State or elsewhere, as do other States where the causes abound; still, it indicates the intention of the democracy making the law. Moreover, it is the administration of the law (responding, as it must, to public sentiment), which tells the story; as when we find one divorce granted because "the husband has broken plaintiff's nose, fingers, two

of her ribs, cut her face and lips, chewed and bitten her ears and face, and wounded her generally from head to foot" and another, also for "cruelty," because "during our whole married life my husband has never offered to take me out riding"; and another still, because "a rich girl, disliking her guardian, went to the hospital with the intention of marrying a dying man, thinking that as a widow she would be freer and have more control over her estate; she married a man seemingly at the point of death, but he recovered; and the wife brought suit for cruelty and fraud, and the divorce was granted." These instances I take from the same Government report; and in it the Commissioner, Carroll D. Wright, prints a table entitled "Movement of Divorce, 1867-1886," showing that the percentage of divorces to married couples in the six woman-suffrage States was as 1 divorce for each 347 married couples, and in the whole United States, 1 to 481.

The coincidence between woman suffrage and socialism was still more striking. These six woman-suffrage States showed an average percentage of thirty-six per cent of socialistic laws in the years 1889-1890, against twenty-six per cent in the whole country. Yet we must not take these first results too seriously. The six suffrage States had a very migratory population; and the men far exceeded the women in number. And it may be suspected that women, new to the matter, voted freely for socialistic measures without a full understanding of the meaning and tendency of socialism in the abstract.

The rest of my 1893 chapter, urging the wisdom of going slow in the matter of the ballot and giving women some political education first, may now be omitted. The Nineteenth Amendment, like the Fifteenth fifty years before, was rushed through under the excitement of a great war. We are hardly yet beginning to see the result. Specialization of function, the

progress from the homogeneous to the heterogeneous, had certainly been hitherto the way of civilization. What is to be the way of democracy? To throw all the burdens of life indiscriminately upon both sexes is clearly the cruder method. And the increase of young married couples of which both members are employed outside the home, is already notable. And of all women so employed, the proportion married doubled between 1890 and 1920.\*

Animals make none but the natural distinction of sex; savages little more. A society which makes no distinction between women and men is an organic whole made up of units, atoms; our present society is still made up of households, families,—molecules, not atoms—of a man, a woman, and their children. Undoubtedly this presents a stronger front to the socialistic theory than does that of units. It brings with it the institution of marriage, private life, property. These three marked our race's emergence from barbarism. It may be that a still higher civilization may be found to dispense with them. The question will probably be determined by the line that women take.

Unless indeed custom proves again stronger than law. The more we seek by laws to change it, the more, perhaps, will human nature remain the same thing. Most women that wanted it seem rather indifferent to the ballot, now they have got it. After all, a very insignificant percentage have got, or seem to want, public office. And if we look at American or English "big business," it seems to be run by the men much as it was in 1886, and far more than it is in France or Burmah—where the women have no political power.

\*See W. G. Ogburn, "The Decline of the American Family," *New York Times Magazine*, February 17, 1929.

## CHAPTER VII

### MINOR RIGHTS

The titles of labor, private property, and security; and above all, liberty; cover almost all the matters with which man is concerned in his material career. Cultural affairs—which term let us use to designate those things which are of the mind, imagination, æsthetics, things of the soul rather than the body, psychical not physical—are, with the exception of education, rarely (as yet, at least) touched upon by democracy through its government, though religious affairs were almost the principal concern of modern governments, from Luther's time to the American and French revolutions (the English was primarily motivated by the desire to keep England Protestant). And only such matters as are handled by government, by the state, directly, form the direct subject of this study. De Tocqueville devotes his whole second volume to these cultural things; Bryce considers them not at all. And though we may devote one chapter to them, it must necessarily be largely one personal opinion, as to the present, and mere guesswork as to the future. Yet, as a man's life is more than bread, it is far the most important thing to bear in mind in any appraisal of the worth of democratic civilization. To leave it out entirely would bring back the purblind gropings of the orthodox political economist, considering only the "economic" man.

Still, governments, even democratic governments, despite recent movements with us, intensely concerned with the material, usually leave the cultural alone. It is conceivable that a Chinese or East Indian democracy might extend its control beyond the materialities of life and labor; but in such high matters, an occidental democracy, practical, pragmatical, will

hardly venture. The only exception is—or was—man's religion, and, necessarily in universal-suffrage countries, his education. Our world's past did not consider the former "a minor right"; and indeed freedom of worship or of state control of the church falls logically into the general right to liberty. And we may say it is the principal great right added to the Bill of Rights by our own democracy. Not by the Puritans; they were as intolerant as any Catholic; their punishments were almost as severe as those of the Inquisition, and their government of Massachusetts was not a democracy. The French revolution copied us, repeating Jefferson's very words. The subject is so familiar that we need but remind ourselves of the recent past: state religion, either compulsory or by establishment (governmental endowment and control) existed everywhere in modern occidental countries, from Russia to Rome, from England to New England, from Spain to Sweden; though lightest in Teutonic or Scandinavian Protestant countries, only (for peculiar reasons) not in Switzerland. It survived the revolutions in all Latin-American countries; and though it has lately been abandoned by Mexico, that country has crossed the line and forbidden the Christian religious function—which Jefferson would have agreed is just as much a violation of the religious right as is any state church. For, as much as any great human movement can be due to one man, it was his work (and the one he wished recognized on his tombstone), that modern democracy adopted as a constitutional principle that in matters in any way concerning religion its rule should never interfere with the individual: he could think, practise, or even preach, what faith he would; there should be no test oath or religious qualification for state service or voting or testimony in the courts, and no established church, compulsory attendance or support, or any appropriation of tax money to any church or sect or sectarian school or institution. And all modern

democracies have come into line with him; even when Catholic; though, in Argentina for instance, the Roman Church is declared the national church, the secular government nominates the bishops, sending three names for the Pope's approval and he is politically compelled to take the first; and in England there is an established church of which the state names the bishops. But all "disabilities" are gone, even in Spain. And though, in Blackstone's time at least, "Christianity was part of the common law," and some measure of religious test persisted in the courts of justice in England and with us, even this has generally disappeared; entirely in oaths of office, and by substitution of the word *affirm* in court testimony.\* We may safely state broadly that the way of democracy is not to consider religious affairs at all; the state to have no relation whatever to the church; men to be free to worship or not, as they will; and no inquiry to be made as to their belief, either in things political or juridical. Only, when (as in the Mormon case) a religious practice runs counter to the secular law, the latter is to prevail; for this reason the Volstead Act had to make an exception of wine used by Christians or Jews for sacramental purposes.

The present attempt with us and in Soviet Russia to exclude certain scientific or religious doctrine from instruction in the state schools is of course a step in the other direction, that of an established state religion (or non-religion); it is probably but an eddy against the main stream. Should it prevail throughout the United States—as by Constitutional Amendment—or become permanently established in one State—we should indeed have to revise our opinion of the whole future of democracy. Yet things almost as strange have happened in United States democracy: few expected the Eighteenth Amendment to pass, making Federal control

\*Several States, however, still require a belief in God, or, as by the Maryland constitution, a future state of retribution; see the author's *American Statute Law*, vol. I, §§ 45, 46.

compulsory over State law as well as private habit of life. (We say *United States* here, not *American*, for the thing would be inconceivable in Latin American republics. Based, as they are, upon law rather than liberty, the Latin republics, like monarchies and oriental autocracies, are for that very reason careful not to extend the hand of law, the force of the state, beyond the limits universally considered as legitimate.) But should this come to pass, and should on the other hand the doctrine of evolution receive general scientific recognition outside the United States; should it become, as it were, *proved*; we may prophesy that the world-opinion would ultimately prevail, being armed with the great weapon of ridicule; such a creed could not exist, even if in our Constitution, any more effectively than that of a nation which proclaimed, as a political doctrine, that the earth was flat; they would, and with far more reason, in face of the world's attitude, abandon their habit of mind, as the new Turks have the fez.

Are there any other principles, regarded generally by modern humanity as fundamental, that democracy shows a tendency either to abandon or extend? Have any new ones been discovered, asserted, or protected? That a man's house, person, papers, may not be invaded, his private affairs subject to inquisition, even by the government—the great doctrine developed in Massachusetts just before the Revolution and adopted later by English judicial decision—this we have discussed under the general liberty right. And here indeed, under a moral impulse, we find, in the United States, a decided invasion. The national government, in making it a crime to brew ale, make wine or distil spirit "for beverage purposes" within the States (though it does not concern itself with murder, arson, lynching or rape within State territory) has taken such drastic measures to detect and punish such conduct that it has infringed this cardinal liberty right, though

expressly guarded in the Constitution, by the national Bill of Rights,—even to the point of invading a man's house and denying him jury trial. It also shows (our national Congress, and the various Boards—not at present the Executive) an intention to interfere with the family in matters of education and care of children, even during the time antecedent to their birth.

But otherwise than in such matters as have a moral movement behind them, democracy—with the exception of its one great constructive achievement, the placing of women on a political, juridical, and even industrial equality with men, and the separation of the *matrimonio*, the married couple, into a separate and independent twain,—in all its experimentation (and ours is far greater than that of any other country except Soviet Russia) has been by no means radical. Nor has it invented any new dogma, or principle. Nor has it unwarrantably invaded property rights. And it has established general education as compulsory, and with it, even the higher, all at the cost of the government, be it State, nation, or town. These are doubtless the reasons why extreme socialists and bolshevists are so particularly hostile to the great American republic.

As concrete instances, however trivial, are to most of us more illuminating than any abstract statement, let us run over all the laws of all our States for the last twenty years, which either embody a new principle or startle us with some new application of an old one. Feminine legislation, including that upon marriage, divorce, and the children, we have already gone over. We have also had to point out the enormous increase of new administrative bodies, which does not seem to be paralleled in other countries, democratic or otherwise. Not only matters usually hitherto controlled by the individual, but functions of government, even of the courts, are more and more being absorbed by Boards, Commissions,



Inspectors, even by a single censor or "Czar"—to use the popular name—with the consequent sacrifice of ordinary court trial and common-law safeguards; and largely relieving the President or Governor, and even the courts, of what would be their business, and their responsibility.\* This tendency (which seems peculiar to American democracy—it has not yet shown itself in France or to a great extent in England—) belongs properly in our next chapter, Administration by democracies; and it also had to find chief mention in the chapters on Liberty and Property. Suffice it here therefore to note a few of the subjects in which, in the last twenty years, both individuals and the ordinary officers of government, State or national, are now controlled by such Federal or State Boards and subject only to their "administrative" law:

- Corporations, railways, banks, insurance, and all public utilities;
- Horticultural industry, forestry, nurseries, orchards, crop pests, entomology;
- Education, generally; all schools and colleges, state-supported or chartered; school attendance; text-books;
- Doctors, dentists, barbers, embalmers, pharmacists, medicine, osteopathy, optometry, Christian science, dissection, nurses;
- Charities generally;
- Roads and highways, sewerage, drains and drainage, irrigation;†
- Tenement houses, homes in which paid labor is done;
- Plumbers, veterinary surgeons, horse-shoers;
- Insurance, business generally and companies for;
- Labor (generally), hours of for all women and children and for adult men in certain cases; payment of; method; minimum wage for women, children; and in public work, factories, sweatshops, time of payment, even by private employers; employment agencies;
- Mines and mining (in all particulars);
- Building and loan associations, mutual benefit, etc.;

\*The American Bar Association report for 1919 makes instructive comment on the effect of positive regulation by boards rather than by penal prohibition as at common law.

†Only new, of course, in so far as the latter is compulsory over others' lands.

Live stock, cattle, sheep, dairies, poultry;  
Warehouses, receipts, elevators;  
Hotels and innkeeping;  
Horse-racing;  
Water, rights, use, and ways;  
Oil, selling of;  
Hospitals, infirmaries, epileptic colonies, tuberculosis colonies;  
Control of the air, and use of radio waves;  
Automobiles and speed of road vehicles;  
Censorship of plays, movies, and books.

Space forbids more than a general indication; the portentous list of one year's creations is shown in the footnote on page 87.

One of the domains of government where democracy might be expected to make most additions or innovations is that of criminal law, those offenses which are held to be against the state, and which we designate as crimes for that reason, as they are considered to transcend the merely private injury. Of course there is a notable tendency to make into crimes acts which the world has generally considered only as sins, being self-regardant, not even an injury to others, disciplinable, if at all, by the church. This came to us from our Puritan ancestors, New England's theocratic colonies, surviving in renewed strength to-day under the general prohibition and fundamentalist impulse, accelerated by the powerful organization of our Protestant sects and the sudden addition of the women's vote. Simple fornication, as also adultery, is commonly made criminal, but only in North American democracy; desertion of wife or children or even failure to support; so marriage itself may be criminal, if within the prohibited degrees or for miscegenation (with negroes only, but even to an eighth or sixteenth of African blood), never however with Indians; except that Virginia, the home of Pocahontas, makes marriage unlawful with any one having more than one sixteenth of Indian blood or "any trace of blood other than Caucasian." In Louisiana it is even made criminal

to contract a marriage, forbidden by its law, outside that State, though legal where solemnized, and then to return to Louisiana. (Questions of constitutionality I need not consider in this book; such laws are always significant as showing the trend of our democracy.) Abortion is always criminal; and so, in some States, is "birth control" or any contraceptive measure. Concubinage between a white and a negro is also made a felony in Virginia. Kidnapping is heavily punished, even by death, in some States. On the other hand, there is a general tendency to do away with capital punishment, and to shorten jail sentences for good behavior, to release prisoners upon parole or probation or upon the action of pardon boards. One or two States preserve the whipping-post; and hanging is commonly replaced by electricity or gas. There can of course be no banishment, under our constitution; though aliens may be deported, and State governors sometimes pardon a criminal or suspend sentence, on condition that he leave the State. Generally there is an obvious tendency to increase the number of crimes, and infinitely that of misdemeanors; this latter may be effected by mere municipal ordinance, or the order of some Board. The Boston chief of police once said that there were something over eleven thousand separate misdemeanors it was possible to commit in that city—all of which, like "the great text in Galatians," every good citizen was bound to know and avoid. But the law of many States (as now, under the 18th Amendment, that of the Federal government) makes criminal, not only sins, but acts or omissions which had not previously been considered sinful, such as smoking cigarettes or giving tips. Vagrancy was criminal under the old English law; carrying concealed weapons is made a criminal offense in many States, or, in Tennessee, the open brandishing of a knife or gun. Criminal fraud is another domain where our democracy has largely increased, and wisely, acts which are criminal or at

least illegal; the "blue sky" laws are the familiar example, but laws requiring purity of food or drugs, that goods generally should be what they purport to be (as wool, cotton, silk, etc.) and for truth in advertising, prospectuses, banking circulars, are striking examples; then there is the familiar one of laws forbidding sales by a shopkeeper of his goods in bulk (intending to go bankrupt and defraud his creditors) and even trading stamps or premiums. Lotteries, with all gambling, are generally criminal; there is a general attempt to penalize betting on horseraces.

The great subject of socialism must have an early chapter in the constructive part of our study. Here we need only state generally that our democracy has not progressed beyond the stage of "gas and water" socialism; indeed hardly beyond that of water. Municipal gas and lighting plants were tried, but few remain. "Municipal trading," as it is called there, has proceeded much farther in England. Under Bryan's influence, one of our great political parties got almost committed to the general State or municipal ownership of all public utilities; but we seem for the present time to have settled down to the reasonable position taken, in its platform, by the Democratic party in Massachusetts in 1908 (after a lively battle, Bryan being the candidate)—that of State control, not ownership, of public utilities. And (to define what are such) "where competition is impossible, State regulation is necessary"—which brings us back to the old historical reason for the fixing of rates or charges: an exclusive franchise, granted or permitted by the government, or a chartered monopoly, especially in things of necessary general use. Whether one based on a natural monopoly is such, the ultimate action of Pennsylvania or the national government as to the hard coal industry will, so far as our democracy is concerned, determine.

No one considering this mass of lawgiving can fail to note

the value of our American State-system; the facility it gives to the most radical experimentation without thereby endangering the nation as a whole. Good examples are found in the Dakotas, which, in the twenty years we are considering, fell under the dominion of the Farmers' Cooperative League. Thus, in 1919, South Dakota established State cement plants, crushing and sampling works, and State-owned and operated coal-mines, which might be either in South Dakota or in adjoining States. In North Dakota, an Industrial Commission was set up to conduct, for the State, "certain utilities, industries, enterprises and business projects now or hereafter established by law." At the outset, the Bank of North Dakota, warehouses, elevators, flourmills, a home-building association, etc., were approved, under a referendum vote. In the same year even Congress declared all real estate within the District of Columbia "to be affected with a public interest," thereby, under that current shibboleth, making possible the control by law, of rents. In 1924, Minnesota also provided for State elevators, and Oregon declared "a public use" all products of mine, farm, or forest, and water for drainage or irrigation. But in Indiana a law of 1905 had enacted that a municipality might sell works for the manufacture or supply of public utilities, on a vote on the petition of a hundred taxpayers—which would seem to indicate that, in that State, municipal trading had already been found a failure.

The notion of "public use," not in material matters, has been widely extended; taxpayers' money may be, and is generally, expended for public playgrounds, bath or swimming-houses, music and municipal bands, even "boosting"—a movement is now on foot to make constitutional the spending of public money for advertising a town's advantages to settlers, tourists, or new industry; Maine, Florida and perhaps other States have already done this, and without apparent objection from the courts.

The abstract property right has very generally been limited by "zoning laws," prescribing the construction on particular land of certain kinds of houses or buildings, and their use for residential or other specified purposes only. In fact, one may assert that our democracy begins strongly to recognize the social duties of property—though not as yet, of labor.

In 1923 several States enacted that women and men should be equal in all marriage rights. Nebraska required a medical examination from all persons contemplating marriage, and no person afflicted with hereditary epilepsy or insanity could marry unless subjected to a sterilizing operation. Medical examinations for venereal disease are very generally now required before marriage. Iowa actually prints a list of all persons disqualified for marriage by physical reasons.

Despite the 14th and 15th Amendments, there are still laws aimed at the negro; we have spoken of miscegenation; even social intercourse is restricted; in many States they must have special schools; in South Carolina they must be separated in factories; and usually in railway cars in the South, while even in Kansas they must have separate Pullmans or sleepers, or, in Oklahoma, telephone booths.

Aliens are with us being treated more harshly. More and more they are being excluded from the ownership or even long leasing of land. President Kellogg in his admirable address before the American Bar Association in 1913 held that when extreme anti-alien laws, like those of California, run counter to a national treaty, the latter is superior; other jurists question this if the treaty invade a right reserved to the State under the Constitution. England, France and other democracies have usually no such legislation against aliens; rather, on the contrary, they incline to make them or their children citizens sooner than they themselves would wish. But the power to exclude foreigners, and, still more, to limit their right to land-ownership, is not peculiar to a democracy

but is a necessary attribute to all sovereignty. And on the broad subject of nationalism, we can as yet discern in democracies no abatement of patriotism; rather the contrary—see, for example, our own country and France, on the one hand, and the fiercely nationalistic new republics of South America and the Balkan States, on the other; only in Soviet Russia does a distinct avowal of internationalism appear. Autocratic countries or those of autocratic habit are distinctly less so. On the whole therefore, on this most important of all matters which concern the state as such, we can find no new tendency; rather does democracy appear to accentuate man's previous way of thinking.

## CHAPTER VIII

### ADMINISTRATION OF GOVERNMENT

The administration of government under democracy is the sole subject of Lord Bryce's last important work. "It is of the Form of Government as a Form of Government—that is to say, of the features which democracies have in common—that this book treats" (Vol. I, p. viii). He avoids "economic topics . . . and . . . schemes of social reconstruction . . . which have diverted attention from those problems of free government which occupied men's minds when the flood tide of democracy was rising. . . . That generation busied itself with institutions; this generation is bent rather upon the purposes which institutions may be made to serve" (pp. ix, x). These last, with their result so far as seen, form precisely the subject of this book. I have searched long for a good title and brief: on the whole, *The Western Way* seems best, thus limiting our study to American democracy, as it indicates both the way it is going, the *whither*; and the condition, the *how*.

Bryce was not, in this last work, optimistic; for instance, he concludes his chapter on France by saying (p. 299): "the power of wealth, apparently greater . . . than anywhere else in the world." De Tocqueville, the prophet, writing ninety years earlier, begins a chapter with the remark that "Nothing is more striking to a European traveller in the United States than the absence of what we call government, or the administration" (Vol. I, p. 72, ed. N. Y., 1845). But he would probably not say this to-day. Yet the great danger to the Republic, apprehended by all the great Americans its founders, by all its statesmen from Jefferson to Coolidge, with the possible exception of Blaine and Roosevelt, was the centralization of all powers in the Federal government at



Washington. All save the extreme radicals in both parties generally admit it, though but as "hypocrisy is the tribute that vice pays to virtue." De Tocqueville says further, "I believe that provincial institutions [he means local self-government] are useful to all nations, but nowhere do they appear more indispensable to me than among democratic nations. In an aristocracy order can always be maintained in the midst of liberty . . . it protects the people from the excess of despotism, because it always possesses an organized power. . . . But a democracy without provincial institutions [i. e., State and local governments] has no security against these evils. How can a populace, unaccustomed to freedom in small concerns, learn to use it temperately in great affairs?" And again (pp. 98, 99): "I am convinced that democratic nations are most exposed to fall beneath the yoke of a central administration. . . . The constant tendency of these nations is to concentrate all the strength of the government in the hands of the only power which directly represents the people . . . when the same power is already in possession of all the attributes of government, it can scarcely refrain from penetrating into the details of the administration; and an opportunity for doing so is sure to present itself in the end, as was the case in France . . . I have visited the two nations in which the system of provincial liberty has been most perfectly established and I have listened to the opinions of different parties in those countries . . . I know of no one who does not regard provincial independence as a great benefit. . . . The only nations which deny the utility of provincial liberties are those which have the fewest of them" (p. 100).

This matter has been much discussed by the present writer in other books and by other American publicists.\* Though

\**The American Constitution*, New York, 1908, 1914; *The American Constitution as It Protects Private Rights*, New York, 1923. Perhaps the best collection of opinion is to be found in Charles Warren's *History of the Supreme Court of the United States*.

centralization exists in all other countries, we sought to do without it, realizing that our country was far greater in extent and in diversity of custom and culture; differing indeed at first on the cardinal question of human liberty,—being half slave, half free. Brazil, the next largest democracy, is the least centralized of all; Argentina, the next largest, the most so; *unitarian*, they call it; mainly because it consists but of one great city with a sparsely settled hinterland. But this is after all a question of the *form* of government, though indeed its consequences have a cultural effect, lending themselves powerfully to the theory of *control* rather than individual liberty and local preference. Thus, though the question whether it is to exist in the future United States is primarily political, the future condition of its citizens, even the duration of the Republic, may be said to depend on it. And as to its probable results, already in part realized, we may assert categorically and without challenge that it will greatly increase both the dangers and the faults of our own democracy and, *pari passu*, diminish its virtues and even menace its safety. Unfortunately, all fanatics “with a Cause,” and today most women voters, are in favor of it. Can they—the latter, at least—be educated, before it is too late? For no creature, person or government, will ever relinquish a power it has once grasped.

Let us now consider the administrative working of democracy, in the most important qualities which are desirable in a good government. First, honesty; in elections, in political affairs, and in administration. Second, ability of its officers. Third, economy. Fourth, intelligence. Lastly, the efficiency and the viability of the government as a whole. And, shall we add? its ethical purpose, peace among other peoples, good will within its own.

It has been said by political philosophers of all times that a democracy must ultimately perish by corruption. If we

deny it, we are asked for examples of any that have survived. If we point to Switzerland, they say it is not a republic, or, if one, it is under peculiar conditions, small, decentralized, in constant dread of foreign aggression, and to a singular extent without commerce, manufactures or great concentrated wealth. When in turn we ask for an example of failure, they can only point to Rome—to which we make like reply: it never, since the beginning, was a true democracy, the freemen were few in number, and slaves and conquered nations many; and that it did not perish by corruption alone; the Gauls and Germans came into the pot and melted it. Athens was called a democracy, despite its many slaves; and it fell by corruption, but not by the bribery of the individual voter. So neither side has been able to point to an example—the one of a true democracy, the other of a democracy that has endured. The world and we have hoped that our republic would furnish it. We admit that political corruption, common enough in all countries, is peculiarly fatal to democracies; for in oligarchies and empires the government itself at least is not determined by bribery, nor dependent upon it, as becomes the case in a corrupt republic. A king's ministry or his agents may be bribed, but the king himself is usually above it, just as his people are below. But in a democracy the most fatal form of bribery is not that of officers or their representatives, but of the people themselves; and this whether it be by money given voters or spent in vast sums to advertise a candidate for nomination in the primaries. It is as much worse than bribery of officials as general tuberculosis is than a localized cold. De Tocqueville does not seem to have foreseen this; for he predicts that only our officers or representatives will be in danger of taking bribes, and this because their motive for going into politics is not desire for power, as in other forms of government, but desire for wealth. This, in our democracy, has not proved to be the

usual fault; it is mere political ambition, at worst perhaps the power to benefit "special interests"; while bribery upon the free men of our country, which he thought impracticable if only on account of their great number, indirectly at least by propaganda or advertisement, our vast campaign-funds reveal. And there is a difficulty in preventing the bribery even of large masses of voters, owing to the fact that the result of any one bribed vote seems so trifling as to make it unjust or unduly severe to impose any effective penalty, and each case must be prosecuted separately. It does not, under our law, annul the election; though the House or Senate may unseat; in England, unseating is now left to the courts. Our most dangerous form of corruption therefore is directly of the electorate by what is euphemistically called "the use of money" in ways not criminal; our representatives, once elected, and most of our appointed officials, have been without direct money taint. The great outcry that has been made of the exceptional scandal, as in Grant's or Harding's administration, shows this.

Yet there has been much direct bribery of voters. Owing to our peculiar system of electing the President and our even bi-party division, it is possible to know beforehand the States whose votes will determine the result of the election, and consequently to concentrate large sums in the bribery of localities. Under an investigation, made by the writer for the Massachusetts Reform Club, of the election of 1888, it was shown that a change of some ten thousand votes, in places well ascertained beforehand, would have altered the national result. A campaign fund of ten million dollars—by no means an impossible sum to raise if its use would secure the election—would give these ten thousand ordinary voters ten thousand dollars apiece. The same investigation showed a very general direct money bribery of the ordinary voter, or money payment for "services" at the polls or other-

wise, in the six States considered doubtful in that election—Connecticut, New York, New Jersey, West Virginia, Delaware and Indiana—and the many stories collected make amusing reading.\* The laws of all the States then existing are summarized; and I concluded that the bribery of the individual voter in such cases in national elections could only be eliminated by some system of counting the votes *en masse* throughout the country (which would simply encourage exaggerated majorities in States under strong party control) or by some system of proportionate voting, such as prevails in Argentina. Since 1889 there has been considerable law-making against corrupt expenditure as well as direct bribery; but the evil still exists; and it is, on the whole, less marked to-day in England and France; though the former offered in old days the classic example,† after Rome, which, as early as 432 B. C., had to pass a law forbidding the use of the white robe, *toga candida* (from which we get our word, candidate), and much resembling the British Corrupt Practice Act of 1854! The Romans also tried the secret ballot; but bought voters stayed bought; “faith unfaithful kept them falsely true.” The Calpurnian law, B. C. 67, as interpreted by Cicero, forbade candidates “entertaining people with refreshments of any kind”—even in Ohio the law in 1889 made an exception of “hospitality extended at the candidate’s residence!” And so, the Roman republic made efforts far in advance of ours; yet in B. C. 62, Cæsar owed over a million dollars of our money; Marc Antony, at

\**The Methods of Bribery and Its Prevention at Our National Elections*, Cambridge, 1889.

†The same pamphlet copies the bill of Sir Mark Sullivan’s agent in 1826 (p. 22). I quote two items

“To 6 beds in one room, and four in another, at two Guineas every Bed, and not more than 4 in any bed at any time, cheap enough, God knows, is to me £5 5s 0.

“For Nurse for poor Tom Kernan in the middle of the night, when he was not expected, is to me ten hogs, I don’t talk of the piper for keeping him sober as long as he was sober, is to me £0 os. od.”

One wonders why only the nurse was gratis and the hogs not charged for.

twenty-four, \$250,000; at thirty-nine, a million and a half; and Milo, in B. C. 52, three millions and a half—all for bribery and campaign expenses. France alone of democracies seems to have escaped direct bribery of the individual voter; the French have even no word for *bribery*, no verb *to bribe*, but have to use a paraphrase. Indirect influence—bribery of localities by the promise of public works, of labor by public employment—is common enough and they do have a special word for fraudulent public contracts—*concussion*—and for misappropriation, *virement de fonds*.

But democracy seems slow to arouse to this evil. The best laws I found in 1889 were in the radical communities of Texas and Arizona, which made it criminal for anybody to raise money or to employ or be employed by any one else in any kind whatever of election work—which to-day would of course apply to the primaries.

In Italy and the South American republics, bribery of the individual voter is hardly necessary; his temperament is always to vote for the party in power.

When we come to the bribery of officeholders, it is probable that enlightened and experienced democracies show a distinct improvement over monarchies (it is always to be remembered that we include Great Britain under democracies). But the change to the democratic form has not probably in any way altered the amount of such bribery in other European countries, or in all but the most advanced republics of Latin America; while in all oriental countries, bribery is a recognized social institution—like the “tip” in England and France. Our democracy has had, on the whole, singular success in keeping its courts pure; especially in the Federal government and those few States which still, like it, appoint their judges for life. As much cannot be said for administrative heads or executive or judicial commissions. Judges wear the ermine; Boards do not.

In all countries, democratic or imperial, corruption by giving place, financial opportunity, or even simple information, is the great danger, not direct money bribery; and this it is almost impossible to reach through the courts, but only, if at all, politically; and even this possibility only extends to the office-holder; for a Doheny—or even a Daugherty—to use the most recent alleged examples—is usually indifferent to his future political career. Democracy, by placing all power in the hands of a legislature and administrative officials, is peculiarly the victim of this form of corruption; for a monarch is, notwithstanding the instance of Charles II taking a bribe from France, usually above a money bribe. In this respect American democracy is the worst sinner, particularly South American, followed by French; while England has maintained the highest standard, although no higher than that of autocratic pre-war Germany.

Ability. Bryce concludes it to be on the whole inferior to that of autocratic governments; but we may question whether our high officials do not make, in the main, a good comparison. The army, perhaps the navy, is best in a Prussian-like government; but war is not democracy's rôle. Lower administrative officers are probably far better in Germany; but they are named for fitness, and serve under some compulsion by the government; and France has the equivalent in a trained and permanent bureaucracy. But quasi-autocratic governments are more successful in drawing men of high ability from civil life.

The Bench—a president will probably appoint as good judges as a king; but this cannot be expected of a popular election; and Bryce states that the judges of the forty-three States which leave the choice of judges to popular vote, whether candidates are picked by the party organization or direct primary, are distinctly inferior to the judges of Federal courts and of those States whose governors appoint them and for life.

Lord Bryce also points out "professionalism in politics" as one of the eight defects he observes in democratic government. "The growth of a class which makes its living out of politics, due partly to the number of persons needed to work a party organization and partly to the existence of legislative and administrative posts sought as a livelihood and obtainable by party patronage, tends to pervert and even debase politics by making it a business occupation, in which the motive of civic duty is superseded by that of private gain. The class, large in the United States," etc. (Vol. II, p. 454). And he might have added, "the immense waste of energy and loss of time." There are hundreds of thousands of our citizens, usually lawyers, but in New Hampshire and the South often doctors, fillers of town offices, local bosses and members of town committees, who give quite half their time to political work, sometimes for the mere pleasure of the game, and at best with a possible postmastership or two-year seat in Congress as the goal. And even the ordinary good citizen "out of politics," especially with the recent complication of political machinery in direct primaries, candidate elections, filing papers, registering as a voter, initiatives, referenda, *et hoc genus omne*, must give an altogether disproportionate portion of his time and thought to affairs of government. All this is saved under autocracy, while aristocracies breed a select class who are trained to it; one may almost sigh for the good old times of the *Roi d'Yvetôt*, when even the king took little time for politics. I do not think, with Bryce, that much of this is due to the practice of paying legislators; it is due rather to indirect advantage, patronage, to say nothing of the more defensible motive of vanity.

But much of this is curable; we may (perhaps!) yet learn to decrease the number of our officials and reduce our electoral machinery. The laws should take no notice or control of anything up to the day of election, nor in any way recognize



candidacies or political parties (except of course in non-partisan boards). The extra-legal nominating convention was after all the simplest, cheapest, and most intelligent method of designating a party candidate; the mingling and mutual acquaintance of the leading men of the party at and before such conventions, was of infinite value; and there are many signs that we shall return to it; it is a distinct step in advance of nomination by the party machine, which still prevails in England and France, and far better than the present welter and chaos from which only rich men profit, even were all improper use of money done away with. The referendum, in rare cases, may be valuable; but the initiative is unnecessary, and the direct primary a dangerous nuisance, in so far as it is established by law; all that is good in it may be got by the old informal caucus or pre-convention meeting or petition.

However, these are only the mistakes, the experiments, of democratic government; they may be cured, abandoned; they are not faults of democracy as such, but of its momentary intelligence.

It is in economy, however, that democracy has been most disappointing—to those, at least, who are not politically minded toward socialism. The report of the American Bar Association for 1924 puts the national debt at \$210 per capita; and says “that every man, woman and child in the United States pays for taxes sixteen cents out of each dollar earned.” The national debt is of course due to the War, for which democracy is not responsible; but many of our States, with no war-charge, tax the citizen up to 3% or even 4% of the capital value of all his property, real or personal. Economically, such a tax seems prohibitive or impossible, an annual tax equal to the earning value of property (for capital, with good and bad investments averaged, cannot be said to return a net over 4%). If he cannot evade it, the average man will learn to spend his principal; as Holland found was

the case, a century ago, when the interest rate on money went below 2%.

For democracy's temptation to spend money, taken almost entirely from the few for the many it benefits, is very great; and that, from the worthiest of social motives, we have so much yielded to it, ought to appease the eager socialist more than it does. Take a conservative Massachusetts town as an example: it spent last year, for schools, \$257,455; for roads, \$48,000; for fire protection, \$34,575; for the poor, \$30,050; for town cemeteries, \$11,608; for sewers and drainage, \$27,818; for police, \$23,200; for parks, \$19,500; playgrounds, \$3,800; public baths, \$10,500; tree-protection and forestry, \$7,250; moth extermination, \$6,229; on the public health, \$10,750; dental and tuberculosis hygiene, \$1,000; building inspection, \$800; plumbing, \$350; on a public library with 32,000 books, \$15,000; for the American Legion, \$3,000; soldiers' relief, \$2,889; planning board, \$2,100. Any socialist short of a bolshevik would admit that these are all social expenditures and many are first made by our democracy; Rome gave some of them, but the England of our grandfathers none at all. And finally, for the town government itself, only \$20,000—about 3% on the town's total expenditure of \$655,000. As the valuation of the town was \$18,796,000, this expenditure for public purposes was about 3½% of the income of the inhabitants' total property. They numbered 2,776 heads of families. There were employed 10 policemen at a salary of \$2,000 each, 11 firemen at \$2,000, with \$2,500 for the Chief, and more than 100 in the schools; but many town officials whose duties did not take their whole time had nominal salaries. It is probable that from three to four hundred persons in all were in the receipt of public pay; perhaps one out of every ten adult men and women. And only about one out of every ten citizens paid any tax whatever.

Now this is a good showing; but the New England town-meeting creates a very perfect democracy; the cost of government is very little; the waste comes in the unnecessary or too highly paid labor employed, or high salaries to officials outside the regular government. This is probably American democracy at its very best. And we may add a note on the social conditions: in this town with a total population of 13,000 there were 241 residents arrested that year, against 341 non-residents; but of these 250 were for violation of automobile regulations and 175 for drunkenness (in 1926); only 13 for serious crimes. But, this town is of our best; cities, and other States would tell another story; our city government is almost everywhere corrupt. And in the South and perhaps far West, local government, spending less, gives fewer advantages; in the middle West, more.

As to intelligence, there are probably many opinions. But one must admit that in the United States of 1926 the results are on the whole disappointing. Bryce (Vol. II, p. 454), puts our *political* intelligence next after Switzerland. But de Tocqueville's remark that in the higher education we have fewer scholars *in proportion* than European countries remains probably true, with the exception of science and the mechanical arts. In the fine arts and in literature, it must be admitted, we still fall behind England and France, whose culture does not yet, like ours, spring from modern democracy, though the gap between us (if it be admitted there be one) is lessening every day. The "best seller" in books, the popular magazine and periodical, above all the necessity of advertising and the consequent concentration of it on books with the widest immediate popular appeal, the lowest common denominator; the degradation of newspapers to tabloids, pictures—which the early caveman understood before the invention of letters—rather than reading matter; of the acted drama to the shadow on a screen—almost abandoning the

use of language, which, in plays, we are told they call "chewing the rag"—people who have a vocabulary of but a few hundred words, and are thus as slow in reading the legends of the movies as they are quicker even than the cultivated audience in seizing the point of its pictures—everything on our stage or in our press brought down to the mentality of the greatest number, which, we are told, is that of a boy of fourteen—all these causes have choked the production of good books and acted plays. The country bookstore has ceased to exist, its village newspaper is far inferior intellectually and in content to that of pre-revolutionary times; most books are bought of department stores, which only "stock up" with the possible "best seller" and ruthlessly "remainder" all that do not prove such in the first six weeks. And no book that is literature can be discovered by the public within that time, save such as belong to the lowest grade of intelligence or treat life as the masses see it. On this level we do produce masterpieces—*Cabbages and Kings*, *Tom Sawyer*, *Babbitt*, *Gentlemen Prefer Blondes*, *Dere Mable*—but the last, at least, is already forgotten.

Still more is our literary decadence (always except on these "lower" levels) increased by the immense call of modern mechanical inventions, film and radio, which distract our youth from reading, or from concentration of their minds in any way; we should add the victrola and even the automobile. Our young men coming to college are, we are told by the President of Harvard, now "unable to read a book"; our young women cannot follow a spoken play. Of course all this may pass. There have been times when people cared too much for books—in the Boston of the early nineteenth century, for instance, when Lowell—or was it Emerson?—welcomed with joy his Maine guide's assertion that "reading rots the mind." But it remains true that to-day only "art," so specially named by us, keeps somewhat of its old position

and place; for pictures, sculptures, even minor arts, as well as architecture, depend on the patronage of a (comparatively) cultivated few, they have a small public, but their own; they do not therefore have to descend to the highest common denominator (at its highest necessarily very low) of the mind or the taste of 125,000,000 individuals. While music appeals to all; it is a transcendental language; and like the films, it needs no educated understanding of English speech.

Was the language of Shakespeare's plays really understood save by a city-bred few? If so, the Elizabethans were indeed wonderful. But however that be, our own literature has had to pass from the stage where a book was addressed only to a noble patron or a thousand or two gentry willing to subscribe two or three guineas a copy, to that of a public of a million who can pay far less. Our democracy is gradually adapting itself to the change. And if in the riotous weed-garden the rare flower—the Poe or the Melville—die—"the world has more need of the flower than the flower has of life."

Lastly, when we come to what the founders of modern democracy, even to de Tocqueville, considered the primal question: its viability, its perdurability, its lasting as the usual form of government, at least of occidental nations—we can have, despite the passing backfires of a Mussolini, a Pilsudski, a Primo de Rivera (not a Hindenburg, for even he pays homage to democracy in acting under its forms), little doubt. It still remains true, as some shipmate told Peter Simple a hundred years ago, that a pyramid has the stablest equilibrium of any assemblage of units; that government is least upsettable which has the broadest base. Moreover, we know perfectly well in our hearts, even the crustiest of Tories, the most cynical of critics, that a democratic form of government is in the long run the only one that modern Western

peoples will stand or "stand for"—the colloquialism adds a real linguistic addition to the meaning. But of course this is only true of peoples that are capable of governing themselves. Possibly the Italian tradition is too imperial, the Spanish attitude to central government too indifferent, to throw out the dictator at once; but sooner or later the usual consequence is sure to come: either a liberal revolution or a mob. And the longer it is deferred, the more bolshevist the revolution will be. Indeed, liberal revolutions are rare, even if possible. Ours was made because it was political; the English one of 1689 was made workable by a foreign military adventure. The France of 1789 soon became the France of the Terror; and the same thing happened more rapidly in the Russia of 1917. We all remember how—for a few short weeks—they boasted of their bloodless revolution!

Democracy is the only possible government to-day and for the immediate future; the only workable theory, the only practicable system. We must accept it pragmatically if not from conviction. Good or bad, we of the West are finally committed to it. Our whole attention from now on, therefore, must be given to the "making good." What then is our "Western Way"?



## PART TWO





## CHAPTER IX

### CONSTRUCTIVE EFFORT

We can broadly see that there are two great theories of the secular government of mankind: the one, liberative and protective; the other, prohibitive and directive. No doubt modern democracy started with the former plan. Leaders and authorities cited in our first chapter surely demonstrate that the American, and after it the French, democracy was designed primarily to protect "natural rights"; rights which were then first formulated compendiously, though many of them had been developed and established as cardinal under the English democracy, or (if that term be there applied too early) government by representatives of free men. And though Massachusetts of all modern democracies started most definitely in the other direction,\* its constitutional history shows more strongly than that of any other the earlier trend of democracies toward the liberative principle, from its famous "Body of Liberties" (1641) to the broad protection of a man's house, person, or papers from official search or seizure, resulting from the denial of general warrants to the King's government in the Writs of Assistance case, argued by James Otis for John Hancock and approved by Lord Camden in England in 1765 (see *State Trials*, XIX, p. 1030).†

\*"Democracy," wrote John Cotton to Lord Say and Sele, "I do not conceive that God ever did ordeyne as a fit government eyther for Church or Commonwealth. If the People be Governours, who shall be governed?" (*Hutchinson's History*, Appendix, vol. I, p. 437)

"Democracy," wrote Winthrop, after stating that there "was no such government in Israel," "is amongst civil nations accounted the meanest and worst of all forms of government. To allow it, in Massachusetts, would be a manifest breach of the fifth Commandment." (J. Truslow Adams, *The Founding of New England*, p. 143)

†"The warrant should name the person against whom it is directed; if it does not, it is called a general warrant, and Anglican liberty does not allow it. Where

These two great theories rest respectively on principles which may be summarized as that of *liberty*, and that of *control*; and we shall hereafter so refer to them. In our first part we have discussed the system of full freedom to the individual in all things, as first postulated, and shown how far our democracy has carried it out—as regards life, liberty, personal freedom of either thought or action, inviolability of the freedom to labor or trade,—which, with many other things, were in the vision or dreams of all the founders of government by the people; and in those days they still added (though not of logical necessity) the right to private property. Courts and police were to exist, but only to protect a man in these private rights, as armies did the State; otherwise there was, in the extreme of the theory, to be no control of a man's action, speech or thought by the government or by written law, but only by that beneficent easy-fitting law which grows out of established and accepted custom. And this, the most perfectly enforced of all laws, is never "State" control; it is universal voluntary action. Narrowly expressed, we call this doctrine *individualism*, in economics, *laissez-faire*; its dryest exponent was Herbert Spencer; and its rapid decline and abandonment is one of the surprises of American democracy. But, as we would take a larger view than even the "Cosmic Philosophy," let us simply term it the "Liberty" doctrine.

it is allowed there is police government, but not the government for freemen. It is necessary that the person who executes the warrant be named in it. Otherwise the injured citizen, in case of illegal arrest, would not know whom he should make responsible . . . according to the Anglican principle that every officer remains answerable for the legality of all his acts, no matter who directed them to be done."

Hancock's schooner had a cargo of rum; so this principal American liberty doctrine grew out of bootlegging! It would not have been created to-day. It was promptly enshrined in the Virginia Bill of Rights (1776), Sec. 10:

"That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described, and supported by evidence, are grievous and oppressive, and ought not to be granted."

The other, that of Control, however essentially it be related to the polity of ancient States, city republics, hieratic civilization, or, even farther back, to the taboo and fetichism of the savage state, is now in birth and essence the offspring of our modern democracy; born of its very enlightenment, based, at its lowest, on pragmatism, opportunism or popular desire, at its highest on popular idealism. And it is peculiarly to be studied in our American democracy, where its progress has been incalculably the farthest. In a narrow estimation, it tends to socialism; though it may never quite reach it—any more than the other doctrine, liberty, until all men become Christian or learn to practise universally some equally selfless religion, can bring to man "perfect freedom."

These two differing doctrines set forth the basic question: are a man's action, thought, even possession (though short of crime, or use to injure others) to be controlled by the "State" for its own aggrandizement, even for the supposed benefit of other men or of the community? Is free will, or is control, the best thing? Even our Puritans held that God left to man the former, though he were damned by it. Strong as was New England's control of a man's thoughts or speech in religious things when it was a theocratic State, it was more alive than any country, before or since, to these cardinal liberties under government; and they were first formulated in the Virginia Bill of Rights, the Federal, and the Massachusetts, constitutions—though Massachusetts had a precursor in that extraordinary table of law, the "Body of Liberties," written, circulated, and adopted by its legislative body (though not printed) as early as 1638; and a very few years later, Hooker at Hartford preached his famous sermon basing all government upon liberty and the consent of the governed; and he was a Puritan of the Puritans. However their religious practice differed from this theory, it was this liberty doctrine that grew, choking out the other; and Jeffer-

son, most conspicuously, but a century after the Boston Blackstone and Roger Williams, did away with the Control principle, even in Church matters, in the Virginia Bill of Rights of 1776. As our America was then committed, there is no doubt which principle the Founders chose for our democracy; nor that the French democracy of 1789 looked but to protect the natural rights of life, liberty and property—for, in so many words, they said so.

The rest of our first part was mainly devoted to an investigation of all the manifestations of modern democracies—especially of our own—for the reason above given—to see how far this promise has been fulfilled. And I think we must admit that we have definitely relinquished the principle of Liberty for that of Control.

It has shown itself quite as—nay, more—indifferent to the cardinal principles, careless of the liberty rights, at least when any ethical or beneficial object is in view, as any autocratic government could be; far more than history has shown to be the case with any king when his direct interest was not concerned. Most monarchs, when they got their armies and their taxes, left, like the good *Roi d'Yvetôt*, their subjects alone.

We must therefore take it as established that the way of democracy is control, not liberty. Naturally this does not yet so much appear in traditional France, or even England: their democracy is, as yet, only governmental; ours (the most advanced and hence our chiefest study) is basic, essential, social, circulatory through our whole system, not confined to the head alone. And, of course, we may not go the limit; we may react, we may refuse to accept the full consequences, to carry the experiment through, apply control everywhere in life; Anglo-Saxons are not logical, and their way of thinking still predominates with us. We may not go the road to full socialism, to control of a man's actions, career, thoughts,

tastes, as well as of his gains or possessions; we may, pragmatically and because we don't like it, exclude the State's, even the Federal government's, control in all things,—but to the principle of control we seem to be definitely committed.

Democracy, therefore, having abandoned the principles for which it was founded, it remains to be studied what it can do to justify itself.

The first, and greatest, justification is that no other system is now possible. All other ways of government have been tried, and all have failed, or failed to survive. If democracy is now said to be also on the point of breaking down, it is not democracy in the abstract, but its present institution of representative government; which is, after all, a device. While, in large countries, pure democracy seems impracticable, it is quite possible to do without continuous legislatures; indeed this is the practical working-out to-day in South American republics. It is possible to conceive of an elective ruler, or a commission form of government, based on universal suffrage, which would administer well; the fundamentals being guarded by the common law and a strong written constitution. This would be adopted and amended only occasionally, and by direct appeal to all; and the dangers of the bloc system or of *fainéant* legislatures, which is bringing our present representative government into disrepute, would be avoided. Indeed, under a system of liberty rather than control—which, we have shown, was the primal aim of modern democracy—it might conduct government extraordinarily well. Strong courts, like the American Supreme Court, would of course be necessary.

● But under a system of control, it would not be so easy. If statute law is continually to define, check, direct, the life and conduct and earnings of men; if an enormous proportion of their substance is to be voted to the State as taxes and expended in all manner of constructive endeavor, education,

moral reform, sumptuary control, maternity and birth-pensions, pensions for the old, the needy, or the merely idle, endowment of widows, of mothers, state control of minor children—continuous lawmaking and law tinkering is of course necessary. Take the simple but necessary institution of taxation alone—under a system of clean liberty, it is probable that one per cent of a man's earnings would suffice for all the "State's" needs. But under that of control, the proportion taken is endlessly increasing—twenty-five, fifty, seventy-five per cent—until, under a system of clean socialism, it would all go to the State and be by it expended, with deduction or allowance only for a man's food and raiment. Even his housing would be State-controlled—as we see beginning in the New York proposed State-housing law and the Washington laws fixing rents. And though the surplus would be expended for "social" purposes—nursing, hospitals, education, parks, music, public radio, golf, base-ball,—it may be questioned if the æsthetic enjoyments, even the sports, would be so varied or be carried to such excellence, as under a system of individual artistry.

But, whichever system democracy end by, it is obvious, even in this day of reaction against popular government, that government by the people is the only government which Western or New-World people will submit to. The modern Mediterranean legislative governments—they make no pretense at being democracies—Italy, Spain, Greece,—having never had real experience of democratic government, are at the mercy of the first hold-up man who has the force to "stick them up." The people, long ages used to autocratic authority and timid as are a lot of tourists in a Western Pullman car, hold up their hands and submit, many of them gladly; for the *bourgeoisie* loves order more than all things; and the best of peasantry, that of Northern Spain, knows little of central government and would like to know still less. As the throne of the Czar was said to be "occupational," so

in their sudden loosing from autocratic rule are, in these democracies, the seats of the mighty. And such usurpers are usually content with foreign affairs and the treasury. Mussolini for the moment appears to be an extraordinary exception; but he is not immortal; and government by the people will return; though doubtless, in some States, with a royal figurehead.

If, therefore, democracy in government is to go on—and if, with us at least, it is definitely committed to the one of two possible governmental theories which we term “control”—it is obviously our duty to make it, and that, good. We must approach the *constructive* part of our work. And here we part company with Bryce, who did not consider democracy *qualitatively*, even in his latest book; still less, dared venture on prophecy; but rested with describing its organization, functioning, and political efficiency. He made no effort to describe its *Kultur*, its civilization, its economics, its æsthetics, or its morals; still less, to give advice. Yet de Tocqueville, writing without experience or much length of time to go by, gives half his book to suggestions for democracy’s improvement and to prophecy of its future. In this book we are following the latter author and trying to supplement the former.

De Tocqueville closes his preface to his second volume with these words:

“The subject I have sought to embrace is immense, for it includes the greater part of the feelings and opinions to which the new state of society has given birth.”

And that it is indeed immense let us show by quoting the headlines of only a few of his chapters:

- I. Philosophic method among the Americans.
- II. Of the principal source of belief among democratic nations.



- III. Why the Americans display more readiness and more taste for general ideas than their forefathers the English.
- IV. Why . . . never . . . so eager as the French for general ideas in political matters . . .

[This would seem no longer true.]

- V. Of . . . religion in the United States . . .
- VI. Of the progress of Roman Catholicism in . . .
- VII. Of . . . a leaning to Pantheism . . .
- VIII. The principle of equality suggests to Americans the idea of the infinite perfectibility of man . . .
- IX. The example of the Americans does not prove that a democratic people can have no taste and aptitude for science, literature and art . . .
- XIII. Literary characteristics of democratic ages.

And, in the second book,

- I. Why democratic nations love equality more than liberty.
- II. Of individualism in democratic communities.
- XX. That aristocracy may be engendered by manufactures.

In the third book,

- I. That manners are softened as social conditions become more equal.
- XII. How Americans understand the equality of the sexes. \*
- XXII. Why democratic nations are naturally desirous of peace, and democratic armies of war.

Witness the pending debate in Congress on building more cruisers! In the fourth book,

- II. That the notions of democratic nations on government are naturally favorable to the concentration of power.
- VI. What sort of despotism democratic nations have to fear.

And so on for seventy-five chapters.

Already appalled, let us limit our first study to one of the simplest—material well-being.

## CHAPTER X

### SOCIALISM AS A SOLUTION

We feel sure that democracy with us has come to stay ; and we have found that it is apparently pointed rather in the direction of "control" than of liberty. But a government, though democratic, may assume several forms : individualistic, communistic, socialistic—dismissing, as Bryce does, the anarchistic with regret : it would be so much the highest and best, were the world only all Christian, or even honestly practising Buddhism, or any religion ethical and selfless. And ourselves now also dismissing the "liberty" system with regret : it is the only one that creates *virtue* in man, and (like Christianity), it has never been fairly tried, we turn then to consider what a government, democratic, but whose principle is control, is now doing, and should in the future do.

Although it has abandoned the broad liberty doctrines, it still may range all the way from general freedom of act or contract to general control of life : to socialism in conduct, to general state service. And in things material, it may range all the way from private property to communism.

Though we all pretend to make light of material things, man, in modern life, since the religious wars and the Puritans or Huguenots or the Catholic *Ligue*, is principally concerned about his possessions. Religious conflict has given place to economic ; men no longer fight a hundred years about religion, but four years for State aggrandizement. The Great War has shown us that we have come back to the disputes of savages : we fight for raw materials, to get colonial possessions, no longer, as in earlier centuries, to impose a creed. And however much we may value patriotism, the millennial cure of this conflict can only be what its enemies call "inter-

nationalism." But the first-in-history world-wide effort to approximate this world-peace failed, they say, with the Versailles treaty. We dreamed with a visionary; we awoke to reaction. America held aloof; and the dogs of war, we are told, have gone back to their vomit—despite the fine words of the Kellogg treaties.

Coming therefore to what is practical, we have still to consider government as limited in its object to the selfish ends of the people governed. And these ends—religion being eliminated—are more than ever material. Even in those, democracy aims at comfort, not at quality—as yet. And comfort depends on simple material possessions; and with efficiency, standardized mass production for common needs, we may easily hope to attain this for all, either under the regime of communism, of socialism, or of private property. Which shall it be? If the last, low as our civilization still is, there will yet be superfluities,—who is to own them? No man can consume more than his share of food; but there can be paid service by others, fine raiment and many houses, automobiles and pleasure-toys, like yachts, even some taste for pictures and things of art, which can minister to a man's vanity by being personally possessed. Though democracy places equality above all things, we Americans, its most advanced exponents, appear still as eager for a superfluous share as any Fugger of the Middle Ages—albeit, we may remark parenthetically, that most of us, on attaining it, appear as anxious to give away as we were to acquire.

Is this superfluous share to be permitted? Bernard Shaw has written a silly book to deny it;\* but he does not show how. Or are we to be compelled by some system of commu-

\*Bernard Shaw, in his *Guide to Socialism*, says over and over again, most simply on p. 84: "Socialism means equality of income and nothing else. The other things are only its conditions or its consequences." Perhaps I had more politely said *shallow*, rather than *silly*; but I would ask any scientific socialist whether he is content with that definition.

nism, or extreme taxation, to reduce each man's private substance to the common level; or even to legislate individual ownership out of existence?\*

It is impossible to consider the narrower concept of communism—which, in exact language, relates to material possession alone—without joining in our study socialism, the broader conception, including, as it does, all human action, even thought, which it is to control as well as property in fields or factories; things of the will and of the mind, of *being* as well as *having*. For example, the famous Tennessee law prohibiting the teaching of evolution is distinctly socialistic; so is that of Oregon, requiring all parents to educate their children in the public schools; yet most people do not think of such laws as socialistic until some property right is involved; perhaps this is the reason that the common intelligence usually confounds the two: though communism, the narrower concept, might well exist without socialism, though hardly the other way about. (Less excusably, the same current language is apt also to confuse socialism with anarchism, though they are poles asunder.)

Anarchism is of course the ideal government; or rather,

\*Many American jurists have thought that Socialism, with us, was not an immediate issue of practical politics, on account of the provisions of both State and National constitutions guarding the institution of private property, and as to national socialism, the limitation in the Federal Constitution of Federal powers, and the very general provision in the State constitutions that taxes shall only be imposed for public purposes. Immigration officers, acting under Federal law, have refused to admit, Federal judges to naturalize, immigrants professing socialistic doctrines. But our Supreme Court has taken more advanced ground. Since the decision, in the case of the State of South Carolina against the United States, that the State might constitutionally engage in the liquor business—a finding based also perhaps on other, moral, reasons—the Court would appear to have gone the limit, in the South Dakota case, the power of that State “to lay taxes to carry out such enterprises as a State bank, a State warehouse, elevator and flour-mill system, and a State home-building project, was challenged and sustained” (Charles Evans Hughes, *The Supreme Court of the United States*, p. 225). This case was decided in 1920; but these words, of an ex-Justice of the Court itself, were published in 1928. It is obvious that no further logical step is necessary, short of the prohibition of private business entirely—which indeed would be hardly necessary, with the State a competitor.

lack of it; absence of any 'archy or 'acy. Angels need no rule but love; nor do Christians; but in this present world, we must come back again to our pragmatic present day. Considering first, then, the materialities,—Shall we, as to these, choose for democracy a system communistic, or one of private possession? And again, we see that it is hardly possible to imagine the simpler State, or communal, ownership of things, without the broader State control of action, of life itself. For, at least in a material age, if I have no property of my own, I can only use or enjoy the communal with the State's permission; and that entails State control of my action.

No one—not even Shaw—except in fantasies like Belamy's *Looking Backward*—has seriously considered the working of a socialistic State; still less its cultural result, its qualitative output, as we are trying to do in this study of its working with democracy. What will be the effect on the human mind, heart, soul? From Mallock to Shaw or Wells, they all consider materialities; only the Germans or Russians go deeper. And again we must warn that we have to take mankind as it is to-day; with actual Christians, or under any high religion truly followed, all schemes of government—or none at all—will of course work well.

In an old political campaign the writer, as candidate for Congress, was challenged to a debate on socialism by James F. Carey, then the socialist party's candidate for Governor of Massachusetts. I make no apology therefore for reprinting here many of Mr. Carey's arguments as well as my own; for this is one of the few instances where the matter has been debated as an affair of practical politics.

Socialism has fascinated the minds of humanity for two thousand years; but became definite politically only in the last century after Prudhon, and an acute issue only after the immense development of machinery and the doctrines of

Karl Marx. As a scheme, it is only perfect for industrial, "economic man"; and even for such, taking men as they are and are likely to be, we see at once two primal difficulties. The scheme assumes, first that men will work unselfishly; second that their earnings can, by any scheme of law, be rightly divided. And by this liminal statement, it will be observed, we have already come to consider only the material side of life.

Admitting that the securing to man the full and fair reward of his labor, and, incidentally, the giving every man opportunity to labor—(if he will?)—is the greatest, save one, of all governmental problems—for, if we leave out religion, the affairs of the next world, surely the most important affair to a man in this world, is how he may subsist in it—yet one thing white men hold dearer than their daily bread; and that one thing is their liberty. Still, though the greatest characteristic of the race to which we belong is that we would rather run the risk of starving, free, than die as slaves, we must concede that liberty is of no use to a man without his life. And even those of us who most look to the immaterialities must admit that the materialities come first. If all men's subsistence is not reasonably assured by the present system of individual ownership—provided they are reasonably willing to work, for we cannot escape the primal curse (if it be one) of labor—we must consider any remedy, however desperate. But if a man's living is reasonably assured to-day, and the distribution of earnings is not too unfair, we should consider not only whether a socialistic system would improve our condition as to material possessions, but also whether that improvement would be bought at too dear a price.

Some publicists claim that we ought also to consider a third thing—the prosperity or success of the State. But we are now considering the welfare of men,—and of women and children—and that only. From that point of view, the

"State" is nothing but the persons composing it; we have not yet established a Hobbesian Leviathan; we are still elementary. When it does come, *État* or *Reich*, the State is at once a machine, a monster, for war and economic war, built up on taxes and tariffs. The question between communism and private property at least can be argued out more clearly without assuming any government other than common law. The step further, to socialism, does indeed require a State. But, sticking close to our humanistic viewpoint, we insist that it is the welfare of individuals which makes the welfare of the State, and not the other way round. And if in any case the welfare of the State differs from that of its citizens, we should always choose the latter. It might suit the Emperor of Germany to have every one of his citizens a soldier under orders successfully conquering the world, and you might say that was for the welfare of the German State—until you remembered that it would not be for the welfare of the German individual.\* And in case it is argued that the welfare of the State in some way filters down, we must remember that the State is not preternaturally wise and good, it is only as just and as wise as the men who created it; and as good as the men who are running it.

Complete State socialism, collectivism, that is, forbids any man to make things, or grow things, on his own account; and makes everybody work only for the State, the government; and says that the government shall own all capital, that is, everything that is necessary to producing or distributing wealth,—land, mills, railroads, mines, waterfalls, machinery, even tools, the breeding of cattle or livestock, the labor of horses, yes, the labor of men and women too. Under full State socialism the State must of necessity own men's labor as fully as it owns land and water; the only thing left to a man's

\*This sentence is copied textually as delivered in Faneuil Hall, February 7, 1903.

ownership is to be his necessary clothing, food, and such extras as he can buy out of his savings each day (for they may not be accumulated or invested) if they be paid in money. But they probably will not be paid in money, but in tickets representing the amount of his labor done that day, its "social value," determined necessarily by some board or commissioner. That is, he will have just so much to spend on extras, luxuries, pleasures, as, after his sustenance, the proper official—some inspector with a red band around his cap—thinks his labor has been worth. Routine employments may perhaps be met by general law wage. But anyhow, if they (the law, or the board, or the inspector) deem any man's labor worth more than the labor of the men who produced the necessities of life that he must buy to live (we are at once met with the necessity that socialism, to work, must be world-wide, international; otherwise, how value his coffee?) he can, with the excess (but he will get no interest on his savings), buy a car, or his wife a muff,—or diamonds, or a yacht, or a pool-table, or a flower garden (on such lot of land as is permitted him to occupy)—only he may buy nothing that is capable of *producing* wealth; that is, which is, from the materialistic point of view, of any value. He may buy a book or a picture, or a base-ball ticket or a comic supplement or a movie-seat, or railway or bus fare; but not a loom, or a spinning-wheel, or a turning-lathe, or a printing-press, or even probably a set of tools; and if he can buy them, he will not be allowed to sell the things he makes with them.

"The modern Socialist movement, as represented in Massachusetts by the Socialist party, demands the collective ownership of the means of wealth-production and distribution. By this is meant only those things operated by mental and manual labor in the production and distribution of the necessities and luxuries of life. Private ownership in these things will be abolished; they will become the property of society"—said Mr. Carey.



Socialism, therefore, is the ownership of all capital or means of production; and the ownership also—through absolute dictation and control by power of payment—of human labor.

Socialism as a system is, by its very definition, involuntary; that is, imposed on individuals by government, with or without their original consent. Trades unionism is not socialism, because it is voluntary action, free co-operation of men for a common end. Democracy is based on the individual, and exists to protect him, as plutocracy the capitalist, and socialism, if anybody, the office-holder; he, the government inspector, alone will be paid a salary by the community, live without productive work, have rank and power over other men. He will determine every man's wages,\* without appeal, assign him his or her work, determine his or her promotion. And all but the Jacks-in-office will be mere slaves of the State.

De Tocqueville maintained that so far from there being any natural solidarity between democracy and socialism, they are absolutely contrary the one to the other. "Democracy," he said in a speech in the republican parliament of France in 1849, "extends the sphere of individual independence; socialism contracts it. Democracy gives every individual man his utmost possible value; socialism makes every man an agent, an instrument, a cipher. Democracy and socialism coincide only in the single word, equality; but observe the difference; democracy desires equality in liberty, socialism seeks equality in compulsion and servitude."

Socialism as a theory is no new thing. Writers like Belamy are ever fond of speaking as if they had invented a

\*At this point Mr Carey objected, that he preferred having their wages fixed by a committee elected by themselves rather than by "the capitalist rulers." The answer is, that to the latter they may refuse to work, strike, seek other employment; but from the wage fixed by a socialist government there is no appeal, and no possibility of work elsewhere.

brand-new system; had he been familiar even with the history of his own Massachusetts, he would have known that it was the first system tried by the Pilgrims themselves—and almost as soon given up. For two years they held their land and planted crops in common; but in 1623

“they begane to thinke how they might raise as much corne as they could, and obtaine a better crope then they had done. . . . At length, after much debate of things, the Gov<sup>r</sup> (with ye advise of ye cheefest amongst them) gave way that they should set corne every man for his owne particular, and in that regard trust to themselves. . . . And so assigned to every family a parcel of land. . . . This had very good success; for it made all hands very industrious, so as much corne was planted than other waise would have been by any means . . . and gave far better contente. The women now went willingly into ye field, and tooke their little-ones with them to set corne, which before would alledge weaknes and inabilitie; whom to have compelled would have been thought great tiranie and oppression.

“The experience that was had in this common course and condition, tried sundrie years, and that amongst godly and sober men, may well evince the vanitie of that conceite of Plato & other ancients, applauded by some of later times;—that ye taking away of propertie, and bringing in communitie into a commone wealth, would make them happy and flourishing; . . . For this comunitie (so farr as it was) was found to breed much confusion and discontent, and retard much employment that would have been to their benefit and comfort. For ye yong-men that were most able and fitte for labour and service did repine that they should spend their time and strength to worke for other men’s wives and children, without any recompense. . . . And for mens wives to be commanded to doe service for other men, as dressing their meate, washing their cloaths, &c., they deemed it a kind of slaverie.” (*Bradford’s History*, Mass. official ed., p. 162.)

And even practised, it is no new thing; communism is always practised by savages; and many tribal, or hieratic civilizations have embodied socialism. True, tribes have chiefs; often elective, as they would be under socialism. The whole history of civilization, materially speaking, is but the attempt of men to free their property from common owner-

ship, and their personal liberty from common control—whether such control assume the form of a priest caste, as in Egypt; a church, as in the Middle Ages; or a State, as with the Incas of Peru. To go no further back than Aristotle—some 2,000 years ago, he wrote:

“This style of legislation wears a good face, and an air of philanthropy. No sooner is it heard than it is eagerly embraced, under the expectation of a marvellous love to grow out from it between man and man, especially if the proposer goes on to inveigh against the evils of existing institutions, setting all down to the want of community of goods. These evils, however, are due, not to a want of community of property, but to the depravity of human nature. For experience teaches that disputes are far more likely to occur among people who possess property in common and live as partners, than among those who hold their estates in separate tenure. The life proposed appears to be altogether impossible.”

There are just two differences between this socialism of two thousand years ago and that of to-day. One is that, so our socialists say, Lassalle or Marx, some sixty years ago, discovered what is called the “iron law of wages”—which law is said to make the mechanic’s condition forever hopeless in a free country, and is, that a modern industrial worker, needing machinery, plant, or raw material, is always paid only for his bare subsistence, without any reference to the value of his product, to the full of which he is entitled. And the other modern difference is, that up-to-date socialists concede to a man the ownership of his house or garden, or automobile or books, or statues, or pictures—of anything indeed which may not be used for reproducing wealth.

Now of these new discoveries, the first is false, and the second absurd. It needs only a glance at the America of to-day to see that the mechanical workman—even the unskilled navvy or servant-maid—is paid far more than his mere subsistence. And as to the second, it amounts to saying

that a man may employ his capital—his savings—in any manner except that which these same materialists call usefully. He may waste or spend it, drink it up or clothe his family in all-silk attire—but he may not devote it to creating new wealth.

Lassalle and Marx say, it is machinery that has enabled capital to fleece the laborer; to exploit him, says Gronlund, and refuse him all but coarse food and a tenement; and Ruskin seems somewhat of the same opinion. But in these days of 1929 it is not so necessary as it was in 1903 to devote much time to refuting this argument. It is machinery, is it not, that has made a country where every family has its car and every girl silk stockings; where every boy or girl can get a college education, and the average American factory workman produces \$7,000 as against \$1,000 in 1849.

As for getting the "full product of his labor"—man's owning all the things he makes—what man ever got that except Robinson Crusoe? How much of the fifteen cents that her call earns does the telephone-operator earn? In a savage condition a man owns the game he kills, the flint he sharpens, and the bow he makes. But the moment that you come to any civilization, no man can put his hand to a thing, still less make a thing, that a thousand other men have not helped to make—have not mined, or grown, or carried, or wrought upon, before. How are those men to be paid, if the last workman gets it all? And how manage the complicated series of payments, save by some device like money?\*

If capital—i. e., the labor of other, earlier workmen—is getting an unfair share, the thing will soon rectify itself; but, taking bad with good, it may even now be doubted if it

\*Spengler agrees with Shaw that money is necessary; it "is the counter that enables life to be distributed socially." It is a necessary convenience, the only problem concerning it alone is its distribution. Shaw writes his entire book on the theory that it can be, and would be, solved by the childish answer of equal distribution. *The Decline of the West*, tr. N. Y., 1928, vol. II, p. 464.

is. An economic investigation conducted by experts in 1928 has shown that the invested capital of the United States is earning only about 3% upon its book value. While of the \$7,000 mentioned above as his average production, the workman gets about \$3,000—over 40%.

And if there is a wrong, if wages are fixed too low, we have our remedy; and not even Unions are necessary. Domestic servants are getting \$70 and \$80 a month because they ask for it; it is questionable if they are not getting more than their share: the economic value of a raw Irish girl is hardly so much.\* But there can be no strikes under socialism; that is why intelligent labor leaders are rarely socialists—John Mitchell, Gompers. Why? because free men can combine together and defend themselves—form unions, strike,—which they could not do, under any regime of socialism. Free men can insist on the American standard of life—under socialism the State would fix it for them.

And if, as we have said, skilled factory labor, requiring expensive machinery and plant, is getting 40% of its product, the census of the government stated already in 1900 that labor as a whole is getting more than half. And even assuming that the inspectors and gaugers under socialism would draw no more from the government in payrolls than paid superintendents or presidents now do from the products of their industries, is it at all likely that they would produce so much? Huge profits and exorbitant wages, says Shaw, have occurred “in America as the result of Trade Unions employing first-rate business brains to think for them, and not grudging them salaries equal to the wages of a dozen workmen.” (*The Intelligent Woman's Guide to Socialism*, p. 307.)

\*There are now 28,000,000 wage-workers in the United States, 8,300,000 salaried employees, and 9,700,000 “entrepreneurs” (employers, persons engaged in business or professions on their own account). Measured in dollars having a purchasing power as of 1913, agricultural operatives increased their wages from 1909 to 1928 by 47 per cent, factory operatives by 35 per cent, railroad trainmen by 28 per cent. (*National Bureau of Economic Research Bulletin*, February 10, 1929.)

—But what becomes already of his sole principle of the equal income?

Cloudy-minded socialists have a blind hatred of capital, failing or refusing to see that it is nothing but *old labor* "Capital" is merely the fruits of the earth which have been already gathered, preserved, transformed; that is, manufactured (the exact English translation of this Latin word is *manhandled*) by past labor; the product of the earth, the sea, the mines, the forests, which has been saved, and not consumed; in some cases little changed, as with grain or coal or lumber, in other cases *manufactured*, that is, improved or enhanced in value or transformed into new utilities by past labor. And who owns that capital? In the last analysis, the persons who made and saved it or their heirs or successors. Is there after all any better system? Socialism would give it to the people who never made it, who never saw it, who take no interest in it except to spend—to everybody, indiscriminately, who does his stint of work for the State to-day. And that without regard to the quality of the work or its real value. What *value* is, we must discuss in a later chapter.

Oh, say socialists, we don't mean that; we mean that the State shall say what each man's labor is worth and pay him accordingly. But what is the "State"? Presumably some government Board, that is, at its fairest, if kept non-partisan, Sam Slick and Mike Sweeney and Hans Dinkelheimer and Hick of Hicksville, with perhaps an honest rotarian for the casting vote. It is these men, not an all-wise "State," who are to say what each man's labor is worth and pay him accordingly. But how determine what a man's labor is worth? You make a pair of boots, or you build a ship, or you write a book, or paint a picture, or you spend a lifetime over physical contrivances and make a radio or a telephone—would you rather sell your radio, or your picture, or even your boots, to the man or people on earth who most want it or best understand it, thus submitting your labor to the market

of the world,—or to Hick and Sweeney? Obviously, if your work is any good, you'll want the markets of the world; if indifferent or bad, you'll want a political board. And, until human nature changes, there will be plenty of bad workmen under socialism. Already, in Australia, where the system has been mostly tried, they have a phrase which explains itself—"government stroke."—In a civilization of private ownership, the "stroke" is not for government, but for wife and children.

The orthodox socialists said that wages must be the same for everybody,\* the artist, the priest, the baseball player, the doctor, the commander of a great steamship, the stoker in it, the Italian navy and the railway superintendent. Granting this,—it probably took Watt five minutes to think of the steam-engine, would you pay him only for five minutes' work? Even if he had made all his own models and the State paid him for the months, or even years, he took to work on them, it would come to a very small sum—most of us would not dare to sit still and ponder on steam-engines, because we might never end by inventing one, and then, our work having no "social" value, we'd get nothing at all. We'd rather feel sure of our wages and peg shoes.

Shall socialism pay the same wage to a single man of twenty as to one of forty who has ten children? Granting old-age pensions, there must also be allowances for children, maternity expenses, widows; for surely, under socialism, we shall not have child labor; even our present "heartless capitalism" is getting rid of that. It must surely give extra wage to the man for his wife† (surely her household work

\*"Since all men are necessary to one another in the functioning of the social organism, all men should share alike in the distribution of the products of society. . . . One labor is as useful to society as another. All differences of talent and skill are equalized in the totality of the social product."—T. J. HAGGERTY.

†Not sure. "The employment of women's labor, now no longer needed in the family, would find its fitting place without effort," says Schaffé. No longer needed in the family? One finds it easier to think of factories without women's labor than that women should be set free from the family so as to enter factories!

is of value to the State) and his ten children; if it doesn't, they can't live. But if it does, one apprehends there will be a good many loafers with large families;\* or are we to have truant officers for adults to see that even "father" works? Again, if you don't give this extra wage for family support, the State must support it; and then what becomes of the family? Perhaps there won't be any family, perhaps there won't, under socialism, be any wife. Most logical socialists now admit that the system is inconsistent with marriage, permanent family relation or parenthood. But surely much of man's happiness has rested on these things.

Anyhow, a socialist State must control marriage, regulate it; you can't get married without the consent of some official; and, to prevent a supply of feeble or degenerate offspring, you must not only get your own State permit, but the official must pass on the qualifications, physical and mental, of your proposed wife—or breeder of your children, if marriage be done away with.

But some socialists, seeing the absurdity of the equal wage, try wildly at different systems; one says that some labor, being pleasanter than others, should receive less; the painter or ball-player less than the miner or the ditcher; otherwise all hard work would be left for light jobs; and of course all would prefer to be government officials. Who is to determine? The State.† That is, Sam and Hans and Pat;

\*"Under a militant system," said Herbert Spencer, "that part which does not help in battle or war, composed of serfs, slaves, women, etc., constitutes the commissariat. How, indeed, are women to be paid for their household labor, children for their support, under a socialistic system? If they are paid by the State they will be dependent on the certificate or character or reference given by the husband or master. If, on the other hand, the State allowance is paid to the husband, the woman will be as much his slave as in oriental countries."<sup>2</sup> Spencer is *arriéré*; it will be paid to the wife, or the unmarried mother. Still, it is difficult to assess the value of a mother's milk.

†Marx tries to allow free choice of occupation to some extent. "Men will work best in lines their own tastes and powers lead them to. . . . This condition of things can only be realized, first if population is regulated; second, if unproductive labor is suppressed, third, if the means of labor are made common property. . . ."<sup>3</sup>



and the result would be the most awful corruption and tyranny. No man—or woman—would have an escape but by bribing that Board; no trade union could help him, no competing employer give him the job he wanted, no other trade be open to him—or her; and women will always have other bribes than money. Hans and Pat and Sam would order him to any work, as in old days men were sent to the galleys; their judgment would last his lifetime, would be final on his career. He might indeed emigrate, and he probably would, if there were any nation not yet a socialistic community. But socialism, to succeed at all, must be world-wide; or it could never survive the economic competition (to say nothing of the more enjoyable life) of free countries.

Only God is wise enough to determine a man's value.\* And the next thing to Divine wisdom is the collective wisdom and experience of humanity—not the collective wisdom of our Sam, Pat and Hans—but that general judgment of mankind and man's experience which governs the markets of the world. And though the wisdom of all men combined does not reward a man according to his deserts—frequently it does not until after he is dead—it makes on the whole a better shot at it than any Board of three or any one commissioner can do.

So much for the difficulty of apportioning wages. Now for the product. Wages, even socialists admit, can only come

\*"It is evident, therefore, that, taking all men in their organic interdependence, exchange-value does not permit a distinction in the quality of labor. It is the quantity of labor which counts. The man who works for a day, whether making bistouri-knives or wagon-axes, gives his life for that day. The value of the wealth which he creates in that day is not measured by its relation to other wealth so created, but by its relation to that which is the source and norm of all value, man's labor. . . .

"Under a proper economist system, where the organic people would own all the means of subsistence, these social units of labor-time would be equalized in the higher trades and professions by the nation's giving full share of the necessities and comforts of life to the men and women engaged in the apprenticeship or study which is required to fit them for a fruitful after-discharge of their duty and service to their fellow-men."—LIEBKNECHT, *Socialism, What It Is and What It Seeks to Accomplish*.

out of products; and their whole claim is that they don't get their fair proportion of the product. They say that there is a great surplus value which is now appropriated by individuals, by the capitalists, and which under socialism should go to the laborers, or at least to the State, and be distributed by it, after it had got its rake-off for new capital installation and all its salaries; for, functionaries galore as we have now (it is commonly said that there is one paid employee of government to every seven of wage-earning citizens), there would be vast hordes more under socialism.

And how disproportionate is the share which now goes to capital? By the United States census of 1900, about one-seventh of the total product—\$1,905,185,604. But out of this must come all the taxes; and already (1926) with railroads, taxes exceed dividends. In England, Flint, of Edinburgh, said that if the workmen of that country were to receive all the profits of capitalists to themselves, they would scarcely receive four shillings a week more than they do now. Here, if capital earns an average net of 3%, giving it all to labor might increase wages as much as 20%. But one can not fairly study the practical working of socialism and believe that after the laborers, competent and incompetent, have been paid off, and the salaries of office-holders, and the taxes necessary to meet the vast overhead of a socialist government, and the necessary amount taken for depreciation, raw material and new construction, there will be any surplus left at all.

And while, under the present system, some capitalists make great gains, others make great losses. When a man sinks a million in an unsuccessful industry—or the Barings a thousand million in Argentine railways—it has all gone to labor; it has, literally, been given away to labor—not only has the capitalist got no return on his capital, but he has given away the capital itself—"blown it in"—to the mechan-

ics who built his mill, the miner who got his raw material, the sailors who moved it, and lastly and most obviously to the women and men who worked in his mill during all the years it took to prove the enterprise a failure. Now, under socialism, the State would have to shoulder this loss; and it would have to be made up from the "surplus value" created by the laborers in more productive or successful industries. —But the State will make no such foolish experiments, I hear some socialist say. If the State risks no experiments, no new enterprise, civilization will stop right here and now, progress be arrested, and we shall be like old China.

Whatever can be urged against the present system, wages are paid anyhow; while capital sometimes is not; and capital to-day can only be spent in giving employment to labor, mainly in productive industry. But socialism forbids this; you can only eat, waste, or buy toys. The great Baring failure sunk seven hundred and fifty millions of dollars; but they had all gone to pay wages for some laborer, except a few that went to buy land, rights of way, or legislators,—and these ultimately got down to labor just the same. Do socialists suppose there will never be bribery of their legislators or their officials? Why? There won't be money; but there will be "labor-tickets" just the same. Only, when you then bribe Sam and Pat and Hans to give you a place on the city base-ball team instead of work on the dumps, you'll have to give them enough to live on a long time, for they won't be able to invest it or speculate with it, as now.

"The real question for socialists to answer," says Rae [*Contemporary Socialism*, p. 330], "is not whether it is just to pay private capitalists for the service society accepts at their hands, but whether society can perform this service better, or more economically, without them; whether in short, the abolition of interest (or profits) would conduce to any real saving in the end? This practical question, crucial though it be, is one, however, which they seldom address themselves—they prefer expatiating in cloudier

regions. The question may not with our present experience admit of a definite and authoritative answer; but the probabilities all point to the conclusion that capitalistic management of production, costly as it may seem to be, is really cheaper than that by which socialism would supersede it. Capitalistic management is proverbially unrivalled for two qualities in which bureaucratic management is as proverbially deficient—economy and enterprise. Socialists complain much of the hosts of middlemen who are nourished on the present system, the heartless parasites who eat the bread of society without doing a hand's turn of real good; but their own plan would multiply vastly the number of unnecessary intermediaries depending on industry. Under the regime of the capitalist there are, we may feel sure, no useless clerks or overseers, for he has the strongest personal interest; in the socialist Mandarinate, the interest lies the other way."

The great Brazilian steamship company is a government-run institution. Under my personal observation it should, during the War particularly, have made huge profits; not a ship but was filled with cargo and passengers between every port; yet it never paid, and was finally put into insolvency—because every politician or person with a pull got his friend upon it as sub-manager or at least supernumerary clerk—to say nothing of free lunches at every port.

But can a socialist bureaucracy even run modern complicated civilization at all? Herbert Spencer wrote:

"No council of the wisest men in London, although invested with absolute powers, could feed, clothe, lodge and employ the population of that city, were no man allowed to act without having their authority; were no competition permitted, no buying and selling, and were wages and prices prohibited, and some supposed strictly rational determination of what labor was to receive and what commodities were to be exchanged for, adopted instead. The problem can only be solved by leaving each man free to seek his own interest. Even then, as now, numerous mistakes will occur, but the errors of one man counteract those of another. For the mistakes of collectivism there is no remedy."

The so-called surplus value of labor, after you have charged against it, as you must do, all capital's losses—that

is, all capital which has gone to pay the laborer in other industries that didn't earn their cost and running expenses—is not enough to pay for the extra diligence, and inventiveness, and genius, and enterprise, that is called forth by the present system; which tries to reward a man according to his deserts and to let him keep his reward—to use, or to give away to hospitals, colleges, scientific investigation or worthy charities—as in America he usually does, if his reward greatly exceeds a family maintenance. Still less does it suffice to make up the difference between work into which a man throws his heart and work in which all but the exceptional man in a thousand will take no interest. There may be an occasional doctor who will invent chloroform, an artist who will paint a picture, a poet who will write a poem, and want no pay but the fame of it. But will the “fame” of pegging a pair of shoes a little better than the next man, or doing a dozen or so more a day, make most of us take any particular trouble about it? On the contrary, it will only get us disliked. And will not our own good nature, when poor old Bill next us in the shop can't work so fast as he used to, or pretty Mary behind us gets tired or has bad eyes, make us take care not to work too rapidly? For it will do us no good, you see, and do them harm if we work our best; Bill and Mary will get called down by the inspector, or, perhaps, get their “time.”\*

And this suggests another point—is the State ever to discharge workmen? If yes, what will these do—get their tickets without labor? Then who would work? and where will

\*Dr. Schäffle, author of *The Quintessence of Socialism*, wrote a later book called *The Impossibility of Social Democracy*, having become convinced that the theory would never work in practice. And Rae, “Democratic collectivism undertakes to suppress what is called ‘exploitation’ . . . but it would be the very system to lend itself most freely to exploitation. Marx's vampire, the capitalist, would show up as a highly respectable figure compared with the social democratic parasites, hoodwinkers of the people, a majority of idlers and slugs. The State would be Archvampire.”

"surplus value" be? If no, how prevent a general idling? Shall the State compel work? How? By inspectors, overseers, nigger-drivers? Surely not.\* But how? Australia is to-day the country where socialism has been most largely tried; and they have developed a quality of labor which they officially now call "government stroke." And present-day England shows how very small a dole will encourage idleness. You will hear Australian cabinet officers gravely say that a public improvement will take so long to build, with free labor, and so much longer, "government stroke"; the railroad so much by private contract, so much more if built by "butty-gangs" (direct pay from the State). And Australian people term government "the milch cow." And men who don't want to work by "government stroke," and to be promoted only by seniority,—so that they stay a fireman twenty years before becoming engineer,—seek private employment—or they emigrate.

We conclude, then, that far from there being a great surplus under socialism to be divided round, the universal condition will be about as good, certainly no better, than to-day is that of the ordinary mechanic; *and there will be no hope of improvement.* We shall be at the end. Life will be one dull, dead round; everybody will work, and nobody will have any heart in his work. There will be no hope of escape; no

\*All must labor, says Shaw, but labor for leisure, not for more than an equal wage, to be paid everybody. (He does not say who is to pay it, nor where the money is to come from; all visionaries prefer the passive mood for their verbs.) But when he comes to the enforcement of such universal labor, he makes ludicrous return to the worst of the outworn systems.

"As we divide-up our wealth day by day the first charge on it must be enough for everybody to be fairly respectable and well-to-do. If they . . . leave anything undone to deserve it, let them . . . be compelled to do it in whatever way we compel evil-doers of any other sort." *Guide to Socialism*, pp. 44, 45.

In other words, as we compel the convict road-building gang, if not by the slavedriver's whip—at best, as we punish criminal vagrancy. But this is nothing new; it was in the very statute of Elizabeth which Shaw begins with. And his system would put all England on the *dole*—a dole system for a minimum of labor, without reward for excellence or new invention.

man can better his condition\* by going from one factory to another, or changing his trade; probably that will not be allowed. General laziness and indifference, "government stroke," absence of all inventiveness, all new enterprise, and enormous waste caused by swarms of State inspectors, supervisors, "under cover" men, created to see that work is properly done. For the history of public employment is the same the world over; set a man to work without hope of

\*Schaffle, himself a socialist, said: "Democratic collectivism promises the abolition of the wage system and of all private service, which involves the continuous enslavement of the proletariat. 'Wage-slavery' is to be superseded by a system of universal service directly to the community: the whole of productive labor would be placed in the position of a paid official of the Democratic Republic. In the existing order officials have the advantage of self-supporting labor at the price of very strict obedience towards often the most insignificant and spiteful nominees of favoritism, and . . . very great uncertainty as to impartial and fair promotion. . . . The freedom of the individual would lose in a degree which democracy would by no means tolerate. . . . Hence Democratic Collectivism itself would be likely to wound in a high degree the most sensitive self-respect, without leaving as much freedom as does the present system of private service, in the choice of employment and employer and a place of abode. Its only equality would be that no one was in any wise independent, but all slaves of the majority." *The Impossibility of Social Democracy*, p. 134.

Gronlund, another socialist leader, shies at any attempt to work out the machinery of socialism in detail, though he states that "volumes would be requisite to give an adequate conception of its benefits," but contents himself with citing Schaffle in his *Quintessence of Socialism*: "It requires years to think oneself into it." It certainly does; for years later Schaffle wrote another book, and entitled it *The Impossibility of Social Democracy*.

*The Social Democracy Red Book*, Terre Haute, Ind., 1900, published about the time of socialism's greatest advance in this country, contains the following on New Harmony and other American experiments:

"Members were to be furnished with similar food, clothing, and education . . . and similar houses. Actual communism was begun in January, 1826. In February Mr. Owen was called in to aid . . . at the end of the month the community was divided into four sections . . . and the *New Harmony Gazette* editorially acknowledged the community a failure."

"Fourierism followed the Owen activity . . . and was doomed to like disaster.

"The success of the Wisconsin phalanx, which operated under a State charter, was due to its leading spirit, Warren Chase . . . When the end came, in 1850, forty thousand dollars was realized and the property divided . . . the Ceresco experiment had been materially successful but not socially so. . . .

"In this sketch of the development of the Socialist movement in America, we have seen first the Utopian forms, Communistic, and finally, in the Socialist Labor party, a kind . . . in which a hierarchy ruled . . . and stood for a State in which the administration of affairs would be, to say the least, bureaucratic . . . apt to develop into a despotism Presented in such a spirit, Socialism had little attraction for the Yankee lover of freedom."

Outside America, we find no more encouraging results of socialistic experi-

promotion or interest in the profits, and you must set another man to watch him.

So much for the economic side of socialism. But there is one thing more important even than a man's food—and that is his liberty. Even if the amount of earnings a man would receive, under socialism, were shown to be greater, no American would accept the system if it was shown to mean a sacrifice of all else that he holds dear in life. The only pos-

sementation. Australia, compared with Canada (the least socialistic of modern countries) is dead; immigration has ceased; the same is true of New Zealand, a great island with only 800,000 people, containing the most fertile wheat land in the world, raising 26 bushels to the acre against 13 in Argentina and 14 in the United States, but so remote that its labor has no competition, is stagnant; no capital is going in, people with capital are leaving, and the only industry remaining prosperous is the trade in frozen sheep.

West Ham, the great municipal socialistic experiment, a city of 300,000, began the experiment over forty years ago; in ten years its taxes rose eightfold, till the small householder had to pay more than half the annual value of his house in taxes, and in 1892 the population—and they were all laborers, wage-earners, there are no capitalists in West Ham—rose and voted the socialists out of office. Since, its mutations of policy, and the scandals of its post-war doles are familiar.

Hamilton, Ohio, was early pointed to with pride as the successful socialist city in the United States, running its own gas, lighting, printing, transportation, etc. The city became in 1901 insolvent and petitioned the courts for a receivership!

The late Hugo R. Meyer, lecturer on Australian government at Harvard, prepared for me some statistics showing, in substance, that since socialism was adopted there immigration had been stationary. From England it was, for the seven years preceding 1860, 25% of the total emigration; from 1898 to 1900 only 5%, while 66% went to the United States. Had it not been for the gold discoveries, 40,000 more people would have left in those two years than went there. In New Zealand, before socialism was adopted (1885), 11,000 people more than came out went into the country each year; since then, from 1892 to 1901, each year 3,000 more came out than went in. The yield of wheat decreased to 12 bushels an acre and the wheat acres from 2,000,000 in 1901 to 1,700,000 in 1902—caused by the men going to the cities where they could get government work. Manufacturing has disappeared entirely. They make nothing for exportation, not even for their own production, except such things as cost too much in freight to bring from England or us; the government machine-shops were so bad that the State had to buy our Baldwin locomotives. Yet they never had a pauper immigration, as we had, and they have a very high standard of socialism. Mediocrity of social condition, and in all other things, prevails; Australia and New Zealand give nothing to the world—save, indeed, the men that Britain used at Gallipoli.

Wm. P. Reeves, member of the Australian government, in his *State Experiments in Australia and New Zealand*, says (vol. I, p. 33) "Immigration has, for the present, almost ceased. The public debt is £270,000,000, while the entire population amounts to three million, less than two persons per square mile." He also dwells on the declining birth-rate and low wages, which



sible excuse for accepting socialism, if it meant in effect slavery, would be that we should otherwise starve; which of course is not the case. Southern slaveholders gave their slaves this consolation—that they were always “looked after.” That argument hardly satisfied any negro; it certainly will not us. All that socialism really guarantees us is our sustenance. And for that we must be prepared to give up—everything else. If indeed we are extra-deserving—or

fell since socialism, despite that in 1889 a minimum wage was fixed by law. While defending the industrial arbitration laws, he admits an enormous increase in the number of disputes in consequence. H. W. Wilson in the *London Mail* said, in 1903 “No country in the world has to carry so heavy a burden of debt—£59 per head against £19 in England; and still greater in New Zealand.” (Of course all such illustrations must be taken from the times before the Great War; for that reason I have not attempted to carry them to the present day.)

New Zealand’s entire foreign trade is not that of a Massachusetts village—\$700,000 in 1888 to 1893, \$650,000 from 1895 to 1900—exports, to all countries, same period, less than \$300,000 a year, of domestic manufactures, mostly hemp and hides.

One great trouble was the railroad rates, wrote Meyer, “four times the average in the United States.” . . . “It costs as much to carry a bushel of wheat from the farmer in Australia, 200 miles to the seacoast, as from Chicago to Liverpool. State railroads are all run at a loss; and cost to build from twice to thrice what at the same time they cost in the United States.” Doctor Dakin, Prime Minister, said, in 1895, “The system had offered no reward to able and aspiring men, and had repressed originality and energy . . . he never could forget the chaos which political management had brought about, the degradation which it had imposed on members and the demoralization which it had sown throughout the service.”

As to the laborers themselves, the Public Service Reports for the year 1893 said that it would take a man 28 years to become the head of a department at £600 a year, and after that all promotions would discontinue. Yet about 12% of the adult population are employed by the government, and in 1901 there were 12,387 applicants for 1,100 vacancies.

The State debts of the Australian States enormously exceed our own. Victoria, in 1894, had one of two hundred and forty millions against thirteen millions in Massachusetts. Wages are no better than in England in purchasing power, and far under our own. Savings in savings-banks far less.

Coming to more delicate matters, the birth-rate in New Zealand fell from 37.32 per thousand to 25.60 in the ten years after socialism was adopted. In the same period illegitimate births increased from 2.87 to 4.63—showing, said Professor Meyer, that people are afraid to marry.

In spite of a high popular education, socialism has so arrested the development of the Anzac countries that they are to-day the least progressive of English-speaking communities—while old Massachusetts, with no vacant land and no natural resources, doubles its population in thirty years.

The New Zealand statistician also calls attention to the fact that in Australia about one half of the first-born children of married couples are of pre-nuptial conception—further proving his point, that people avoid marriage while they can.

extra clever in managing men or political intrigue—we may be given a surplus, which, like a good child, we may “keep to spend.” Only we may not use it to better our condition; to buy another boat, if a fisherman, if a farmer, another field. We may not invest it, use it productively; we can only spend it, like a good child, on candy—on something we consume—on some personal gratification. Could not the African slave do as much? In fact, is not this whole position exactly that of a negro slave? He too was guaranteed his sustenance; he too was allowed to keep and spend his extra money, or what he made by working overtime; he could even buy his freedom with it (which we should not be able to, under socialist State rule); but he was not allowed to better his condition, to invest it, to engage in trade, to change his lot in life. Precisely what makes a slave is that he is allowed no use of productive capital to make wealth on his own account. “Compulsory labor upon all equally, and establishment of industrial armies, especially for agriculture,” says Marx, in his London Manifesto. And the negro slave was at least under orders of one man, who might be kindly; the subject of the socialist State will be under orders of a committee of ward “heelers.” You will say, the slave could not choose his master, but we shall elect the ward politician. Will that help much? And suppose the laborers we are considering didn’t vote for him?

It may be replied that these persons I am talking of are those who are engaged in industrial occupations only, that is, in the creation of wealth by the use of capital. These will, by no means, be all of society. An immense class, far outnumbering them, will be those engaged in some form of personal service (as the census now shows) or in the arts,—barbers, dressmakers, singers, domestic servants (if there are to be any), nurses, writers, painters of pictures—these, still supported by private patronage, will be outside the so-

cialist system, and can exercise their individual powers in their own way. Can they? If so, many—certainly the best men—will rush into those employments and the private avocations, as they have in Australia, leaving only the lazy or incompetent to the State service. To prevent the overcrowding of those industries which do not create wealth—provided always the State employees have surplus enough to pay them for their services—it is clear the State will have to interfere here also, to maintain the personnel of the “productive” occupations, the working bees; the others will appear to the State as drones. Therefore we cannot escape the logical conclusion that the arts too, medicine, research, in fact all the activities of civilization, not the industrial or new-capital-producing occupations alone, will have to be taken under the iron rule of socialism. Socialists have a way of thinking that the industrial classes, the mechanics, form all the people of the community;\* at least all with whose fate they are concerned,—that is because the socialists themselves, so far, are made up of persons engaged in shops or mills or mines; in 1899 the Socialist party in America read out farmers and farm laborers from the party and the same attitude is to-day notably reoccurring in Russia.†

A word should be given as to the use which the socialist

\*The agricultural class far outnumber them; also the class of “personal” or domestic service. According to the *Socialist Almanac*, then, the number of the former (mechanics, industrial) was only five million; while by the census at that time the number in “domestic and personal service” was 5,691,746, and 8,500,000 in agriculture. Socialists seem only interested in the first class, which is already by far the best paid; and this is due, not to State socialism (which would have to reduce it) but to trade-unions, which still rarely exist outside of mechanical occupations. Clerks, shopgirls, work longer than skilled or even manual laborers as a rule, farmers and their help always do; yet both are paid far less; though factory girls are paid less than domestic servants. But this is due to snobbery—the desire to wear a black coat and white collar—one of the first things a true democracy must outgrow—and to the dislike of service under others—which, under socialism, would be universal.

†The *Social Democracy Red Book* for January, 1900, printed the platform of the Socialist party of 1899 (about the period of its greatest strength in the United States). It said, among other things, that the trade-union movement is the chief emancipating factor, and represents the economic side of social-

mechanic or clerk will make of his extra wages, surplus-labor checks. He will be allowed to spend it on personal gratification, waste it, but not use it for any productive purpose. Yet Rae says (p. 334): "Private property has all along been a great factor in civilization, but the private property that has been so has been much more producers' than consumers'. Consumers' wealth is a limited instrument of enjoyment; producers' is a power of immense capability in the hands of the competent." Socialists are really more individualists than their opponents, in the view they take of the function of property: it must be limited to individual enjoyment. And as to social and religious matters, we will not further burden our text, but append a few typical sayings in a foot-note.\*

ism, as the independent political movement represents the political. The exact contrary is of course the case, for the trades-union movement is the concerted expression of individualism, the effort to arrive at results by individuals working together, not by the State. It appears from the same book that the demands of the farmers were completely dropped by the referendum of 1899; they had asked that the Socialist party use its powers as well for the benefit of workers in the country as of those in the city, and demanded specifically that no more public lands should be sold, but should be utilized by the government directly or leased to farmers in small parcels; that grain-elevators, cold-storage plants, should be constructed by the government, to be used by the farmers at cost; that there should be a uniform postal rate for the transportation of agricultural produce on all railroads, and that public credit should be given to towns or counties for the improvement of roads, irrigation, and drainage. Much of this has been done since; indeed, the farmers' demands, as compared with the Marxian theorists', almost fall within that domain of socialistic government action which has long been admitted as "allowable" by all but dry individualists.

\*Wm. E. Morris and Ernest R. Bax, *Socialism Triumphant*, p. 298: "The present marriage system is based on the general supposition of economic dependence of the woman on the man, and this basis would disappear with the advent of social economic freedom. No binding contract would be necessary, for marriage and property in children would cease to exist."<sup>22</sup>

Hasenclever: "The women need no longer, out of regard to the children, be chained to one man."

Hyndman (*Hist. Basis*, p. 452). "The family . . . in the sense of marriage for life and responsibility of the parents for the children born in wedlock, is almost at an end even now."

Marx: "Religion is a fantastic degradation of human nature."

Schaffle: "Democratic socialism is actually and of inherent necessity, the deadly foe of the Christian Church."

Bax "Socialism utterly despises the other world with all its stage . . . would imply the definite abandonment of all religious cults."

Liebknecht: "... Stupidity reveals itself in religious forms and dogmas."

James F. Carey: "Not all the hypocrisy of the pulpit . . . can destroy the

As to freedom,\* freedom of occupation, wage-slavery—who is free from the latter except the trader, the speculator, or the modest *rentier* content to live on the interest of his savings? A friend of mine in a Braintree shoeshop once told me he was a slave now. Is he? He can go to another shop in another town. He can go into another trade. But under socialism this would be impossible; for a man could change neither shop nor trade without some boss's permission. The other trade will be full—the State must know where its people are—it can't have them changing all the time—certainly except as a special favor. And as for changing his shop—the blacklist system existing under socialism would be the most awfully complete blacklist ever known—our man leaves his shop at Braintree and goes to Lynn. The first question is, "Where did you work last?—Braintree.—Why did you leave?—Didn't like Sam Slick, my ward's committee-man on the shoe business.—Got Slick's permission?—No.—Very sorry; can't take you on. Go back and work under Sam Slick."—That will be the way you elect your masters under State industry.

Then as to choice of occupation. The slave has none; will it not be much the same under socialism? The State needs, let us say, 500,000 agricultural laborers, 400,000 unskilled laborers, 200,000 skilled mechanics, 100,000 for public work; 200,000 clerks in stores, 200,000 railroad men, 10,000 policemen, 5,000 engineers, 5,000 doctors, 1,000 architects,

rock upon which we of the despised working class build up our philosophy. . . . Socialism is our only hope, and without that hope, no promise of heaven, no fear of hell, can cause us to have any interest in life."<sup>1</sup>

Bebel: "We wish in religion, atheism. . . ."

Leroy-Beaulieu: "What is known as the socialism of the gospel, far from resembling socialism as we know it, is utterly opposed to it. It springs from abnegation, not cupidity; its leading principle is the contempt of riches, not the greed of them."<sup>2</sup>

\*De Tocqueville's prediction was that socialism would destroy democracy. "The liberty which is thought to be in no danger is almost always a liberty which is in a way of being lost. All democracies in the past have destroyed themselves."<sup>3</sup>

5,000 actors and baseball players, 1,000 lecturers, 500 artists, 1,000 musicians and singers, 10 inventors, 10 authors, 5 composers, 10 artists, 100,000 teachers; I am eighteen, the age at which I have to go to work; my father edits a newspaper, I say I want to be a printer. The State says, no; we only need 10,000 printers and we have got 11,000 engaged now; you go work on a farm. "But I don't like country life—I want to stay in New York." The State replies, "There are only places remaining as street-sweepers."—"Oh, I don't want that."—"Well then, go and help dig the St. Lawrence Canal."

But far more serious than industrial slavery and consequent arrest of progress are the social consequences. If socialism is to recognize the institution of marriage—though, apparently as it seems to-day, it will not—and be responsible for the support of my wife and children, it will, obviously, have to control all marriages. And if I am rather a shirking laborer, won't the State refuse me permission to marry? "You haven't yet shown the ability to support yourself, let alone a wife." Or (State eugenics will come in; we have already, in our first part, seen the entering wedge) "You belong to a stupid family that are only good to work on farms; our farms are chock full already—anyhow, you can't marry this city girl." And even if we pass the State bureau of eugenics, and the economic Board; then we have to go to the State medical department. Now the State doctor in our ward is an allopath; our family is homœopathic—or, perhaps, we didn't employ him when little Sally had the croup, but Dr. Jones, who is a special friend, but in another town. Anyhow, Dr. Smith, the State doctor in our town, has a grudge against my family; he says, no; you have a tendency to consumption, or your maternal grandfather took to drink—I won't give you a license. Or he asks, whom am I going to marry—and he wants to marry that girl him-

self. What would happen? If she's a girl of any spirit, she'd go off with me just the same. And most socialists now admit that the institution of marriage, the family, would be inconsistent with the absolute control that socialism requires. That is why the Catholic Church has been so steadily against it—and why Russian sovietism spews forth Christianity.

The greatest recent scientific apostle of socialism was probably Frederick Engels. In his last work, translated by Edward Aveling and published at Chicago in 1900, he says, referring to Robert Owen, "whose name was linked with every real advance of socialism in England,"—"three great obstacles seemed to him especially to block the path to social reform—private property, religion, the present form of marriage." The Pope's Encyclical of May 15, 1891, said, "The socialists, therefore, in endeavoring to transfer the possessions of the individual to the community, strike at the interests of every wage-earner, for they deprive him of the liberty of disposing of his wages, and thus of all possibility of increasing his stock and of bettering his condition in life. . . . Every man has by nature the right to possess property as his own. This is one of the chief points of distinction between man and the animal creation. . . . It is the mind, or the reason, which is the chief thing in us who are human beings . . . that distinguishes him essentially and completely, from the brute. . . . And on this account, it must be within his right to have things not merely for temporary and momentary use, as other living beings have them, but in stable and permanent possession; he must have not only things which perish in the using, but also those, which, although used, remain for use in the future. . . . The family is even above the State, and to have the State perform its duties, is to destroy it. Paternal authority can neither be abolished by the State nor absorbed by it; for it has the same source as life itself."

Without necessarily going so far as the Pope, we must all admit that the State under socialism, must absolutely control, or abolish marriage; and, if the latter, must have power over the children, when born, if not before. The State can recognize no religion—except in some country, if there be such, where the people all have the same faith—can pay therefore no ministers or priests—and these will become, either an order of mendicant friars as in the Middle Ages, or, more likely, a caste, a hieratic power as in Egypt, and, very likely, the only people really possessing property—and everybody will want to become a priest, as in the France or Spain of St. Dominic's time; more so, for now there will be no landlord nor peasant proprietors. The only other class so fortunate will be the very class we mostly now wish to get out of—personal service; and not only domestic, but the dancers, singers, actors, all persons who live, like the jongleurs of those same Middle Ages, by the favor of others, by pleasing or amusing. They, by their arts or graces, will still be able to extract those surplus-labor tickets from the industrious and spend them as individuals do to-day.

But again, how about the spending of them? What can we get for them? The State, being sole producer, all wares would be standardized. Suppose I want a Corot, or a Keats? Well, the State isn't painting any Corots just now, and Keats is out of print. We want to see a play by Shakespeare? The State isn't acting Shakespeare; he is reactionary. We want a glass of beer—the State, by majority vote, doesn't make beer.\* We want ten years' leisure, to write a book, or to travel, or invent, or paint a picture; well, you are not a State artist; and the State gives no funds for idle travel.—The State will indeed control what we read, what we pub-

\*This sentence is taken literally from the Faneuil Hall debate of 1903, with most of the citations of authorities, as it is interesting to see what changes a quarter century has brought about as to their truth to-day.



lish, if not what we may write and think. What is to become of ambition, of hope, of *joie de vivre*?

The opportunity for corruption would be terrible. For the individual man would come in touch, not with an allwise State, but only with the two or three State inspectors that happen to be next him any moment of his life. Are we to assume that they will be perfectly wise, perfectly good? It was Lincoln who said no man is good enough to govern another; but the State inspectors that happen to have the power of decision at any moment of a man's life, be it on his pay or his kind of work or his marriage or his children or any other thing for which the State's consent will be necessary—and under socialism it will be necessary for practically everything—will have the absolute control of his life at that point.

There will be practically no appeal; even if the State has time to permit appeals, what chance will the ordinary man, with no "pull," have in appealing from one bureaucracy to another? The office-holders will probably make a caste, they will certainly belong to some political party—and they will have the control of that man's life in a way that nobody, under God, has control of it to-day. Their power will be so great and their decision will be on matters of such moment to the man, his livelihood, his happiness, his private life being involved, that the temptation to bribery and improper influences will be greater than any human being can be expected to withstand. There will, socialists say, be no bribery in money; possibly not (if the labor checks be not easily transferable)—but there will be bribery of votes, of power, of favoritism—what other sources of influence will the poor man have? A poet said, that when the Devil seeks to lead man astray, gold is a good bait, but woman a better. Devoted women may sacrifice themselves—when all promotion is dependent upon personal favor, what do court histories

show? I touch upon this subject as delicately as I can, but one may fear that, under socialism, that may be the last piece of individualism left us, the last matter in which the action of the individual cannot be controlled without his—or her—will. We hear now stories of improper influence by overseers in factories, shops, of theatrical managers over the girls seeking to get employment on the stage or in movies—will not that risk be multiplied a thousand times when every step in a man's—or woman's—life must be taken under the surveillance of some State official who may refuse to be placated in any other way—. No, as Lincoln said, God never intended that one man should be so at the mercy of another—as any man, more terribly every woman, will be, under socialism, of the State inspector.\*

Socialists hate corporations—yet they would make the State one vast corporation; they distrust politicians—yet they would create a vast army of politicians and place them above the rest of us. They talk of slavery to-day—and would make us all slaves of a thing they call the State—represented in reality to us only by the men who will touch us at each point, rule us every hour, and who are in place by the chance and intrigues of politics. There will be no escape; we must do the work the State bids us, for the wages the State awards us; spend them as the State permits, buy what the State prescribes, marry when the State allows, have children as the State permits, divorce as ordered, fortunate only if our wives are not chosen for us by the State as well. Socialists now complain of the “shriek of the factory whistle”—under socialism we would get up, go to work, stop work, eat our dinner, play, marry, beget children, live and die at the shriek of the State whistle, or the order of the State in-

\*“Americans will not, in the hope of ulterior results, be willing to become parts of a vast machine, in which each one is but a link in a chain, or a cog in a wheel, without power of assertion. State socialism . . . is the veriest despotism, and is radically opposed to the American mind and heart.”—ARCHBISHOP IRELAND.

spector. The arts would tend to disappear, genius in industry cease, the books that teach us the delights of life no more be written—for all would be at the mercy, or whim, or taste, of some State inspector or board.

The one great evil of socialism is the destruction of liberty, individual; of the family, social; of the hope and joy of this life, and of faith in the next. Any system of State general control that is conceivable, when we trace out the details to their necessary consequences, any complete system of socialism, involves the ruling of a man's life in all its details by the State, and results in slavery——

"A dull and hopeless drudgery for a State ration of food and pleasure; a slavery from which there will be no escape, a tyranny more hopeless and more hideous than the world has ever known." (Quoted at end of Faneuil Hall speech, in the 1903 debate.)

We therefore reject any scheme of thorough State socialism for the way democracy should travel. But this does not at all mean State or municipal operation, or even ownership, of businesses, industries, utilities, which, in the growing complexity of our modern life, the State or city can handle best, or where natural monopoly exists, or which are general necessities of life, like air, water, natural power, oil or coal. Still less would we exclude the Fabian approach to socialism by ever-increasing taxation for general social welfare. Each such question is to be handled on its merits. Is it necessary? and if not, can the State or city do it better? are the two tests. In other words, we are opportunists as to such socialism; empiricists, willing to try; and that has so far been the principle of our American democracy. "Gas-and-water" socialism, it was disparagingly called in the England of the early nineteenth century; but that sneer would never have fitted us, for the highest field of all—public education—we adopted at the start; otherwise, as has been shown, we Amer-

icans were strongly against State control, in the time of Jefferson and the constitution-framers.\*

Most fair-minded people must concede that State management has proved not so efficient and less economical than private.† That is certainly so in the case of railroads and ships; and even the mails, usually assumed to be well managed by government, and necessarily, could probably be bettered if the business were owned privately (for instance, there would be no difficulty at all, even with only railroad service, in getting a letter, mailed by a man in Boston at ten in the morning, to his correspondent in New York before the close of that day's business, even without airplanes; and private operation would have the great advantage that a man might sue for letters or valuables lost in the mails, while government is not liable, as a common carrier). But advocates of all-public operation strangely never propose it in the one business where, we can all see, it would be of most value

\*Despite the experiments of municipal socialism, more things have been given up by cities that were entirely administered by them in older times than have been adopted under modern conditions. For instance, the mediæval city and continental cities up to quite recent times ran the churches, had full administration of all religious matters. All cities up to the time of the French revolution, even, were in the habit of passing ordinances under which the personal affairs of the individual were regulated almost to the extent that modern socialism desires to regulate them. There is less regulation by municipal ordinance to-day than during the eighteenth century, not to mention the ancient Grecian laws.—Maltbie, *Municipal Affairs*, New York, 1898.

†Examples: West Ham; Hamilton, Ohio, where the city became insolvent and the government petitioned the courts to appoint a receiver; our experience with railroads and telephones in the Great War, the telephone service in Great Britain; most strikingly of all the working of the Nebraska State guaranty of bank deposits and the legislation of North Dakota as to State elevators, farm loans, etc. I print from the *New York Times* of January 20, 1929:

#### NORTH DAKOTA SEES WANE OF SOCIALISM

"St. Paul, Jan. 18.—North Dakota's experiment in State socialism has almost run its course. It is fourteen years since A. C. Townley started 'taking around' his typewritten sheets containing the millennial program with which, it was confidently expected, North Dakota would set the example for the world. It is twelve years since a fascinated and excited Legislature nailed the seven major articles of faith to the flagstaff of the capital at Bismarck.

"Now about all that remain are a State bank, which does only a rural credit business; a State mill and elevator, which are the subjects of endless con-

and save most waste—that of life insurance. Not only would it save all the waste of advertising agents' commissions, fine office buildings, general overhead,—but the immense menace, already adverted to, of having great reservoirs of quick capital, nearly all a nation's savings, the very control of all financial power, turned into the hands of the few individuals who control the great life-insurance companies—an evil only partly cured in New York, as a result of the famous Hughes investigation. And the government would require no huge hoards of invested funds, and have operating expenses of the routine clerical staff only. Whereas it is probable now that the great life-insurance companies, for each dollar they receive in premiums, only pay back about forty cents to the insurer or his family; in other words, 60% of his money is absorbed by salaries, agents' fees, and advertising—a smaller proportion of net to gross than used to be given by a railroad.

troversy, and a few of the supplementary minor items, such as State hail insurance, State fire insurance on public buildings and State bonding of public officers."

And from the Boston *Transcript* of February 5, 1929:

"Omaha, Neb., Feb. 5 (Special)—Sixty thousand depositors in failed Nebraska State banks who have some \$20,000,000 due them from the State bank guaranty fund over and above the total assets of this fund, have banded together to keep the fund from going to pieces and are intervening in court in a suit to prevent the solvent State banks from 'getting from under' the guaranty fund.

"The Nebraska bank guaranty law used to be pointed at as the one successful institution of its kind in the entire country. But as bank after bank failed, the guaranty fund became more and more overburdened. The fund itself was kept alive by regular and special assessments on the solvent State banks. But these assessments were not sufficient to pay the losses and the fund ran more and more behind until today, according to statements to the court, the fund is something like \$20,000,000 behind.

"In the last eight years 311 State banks have failed and, according to statements of attorneys in the suit made in open court, the capital of 262 more banks is so badly impaired that they may be closed.

"The book values of the guaranty fund's assets total \$39,500,000, but their actual worth, as estimated by Secretary Peterson of the guaranty commission, is but \$10,451,000. One hundred and seventy-nine banks are in receivership and seventy-two are being operated by the commission as going concerns."

"An annual state tax of 50 cents on each \$100 on deposit would be levied against bank patrons as a means of replenishing state bank guarantee fund, under a bill introduced in Nebraska legislature."—Boston *News Bureau*, January 21, 1929.

The reason socialists don't propose these practical things is too obvious; they never want a simple experiment; and the insurance business would raise a howl. And note that even State savings-banks do not pay so high a rate as do private ones.

Nevertheless, let us keep open-minded on this point: our rejection of socialism as a philosophy, as a government, by no means indicates that we should not consider every proposal of State operation, even State ownership, on its merits as it occurs.

## CHAPTER XI

### OF TRUE VALUE AND OVER-PRODUCTION

While the consequences of the Great War are not at present supposed to have been favorable to democracy—though, as we have seen, that is so only in those countries that have never really known it—there has been a distinct reaction in favor of the much derided and scorned system of capitalism, called “heartless” by the followers of Marx. One has only to read the article on capitalism by J. L. Garvin, in the new *Encyclopædia Britannica*—always an excellent indicator of the prevailing opinion—to note this change. We will assume therefore that our conclusions as to the trend of democracy, at least when most enlightened, are to be borne out; we are still to stand by the system of individual ownership, however much it may be restricted or controlled, especially to be controlled when in its corporate form or clothed with an artificial or natural monopoly; and also as to real estate, the private ownership of land, however much it be further restricted or burdened by taxation, or deprived of its heritable quality. And so, after a century of Marx and Fourier, we come back to something of the economic civilization written of (and to) by our orthodox political economists from Adam Smith through Ricardo down to Mill and Cairnes.

The “dismal science” was commonly conceded to be a rather hopeless school. Malthus was its Job, and all its doctrines were rarely popular outside of Manchester; so much so that Ruskin the individualist and Karl Marx the socialist were alike driven to bolt it entirely. But, of all smug sciences

of the smug nineteenth century, political economy, the most cocksure, was the most fallacious. Its four great articles of creed—Over-production, the Wages Fund, the Margin of Cultivation, the Geometrical Increase of Population—to which Marx added a fifth in his “Iron Law of Wages,” that they must necessarily decrease proportionately with the growth of machinery and costly plant and the complexities of our modern civilization—like the five “distinct damnations” of a Calvinistic or ultramontane age, are now by no means to be accepted unquestioned. And their one economic creed which was sound, and made for humanity as well as for peace—Free Trade Among Nations—our twentieth century has thought itself forced to deny, even in the Covenant of its League of Nations, although some clause is hazarded, timidly, tentatively, about free access to raw materials. But the interchange that makes for peace and broadens humanity is not so much that of crude materials as of the works of art and inspiration that a loving master’s hand has fashioned from them; and thoughts and tones and books. Yet we Americans place a duty on books and pictures, and might on songs, if we could.

That there is no such thing as a fixed, set-apart wages-fund, the most casual glance at present conditions in the United States will suffice to show. Wages have been increased almost at the will of the workers. No economic fiction, of a fund of any reasonable amount set apart for the *main d’œuvre* and not capable of increase, will explain bricklayers at \$17 a day, plasterers at even more, common unskilled labor at from \$4 to \$6. If the wages-fund theory was ever true, it was true only of a very narrow civilization and in a restricted locality. It might content the Manchester cotton-spinner, who saw only man’s demand for shirtings. It might measurably be true of industries producing only the necessities of life—man cannot eat more than a fixed



amount, nor use more coal than is necessary to keep him warm; nor can the teeming millions of India wear more than one gown at a time. But as man's demands multiply, wages will go up. Henry Ford, a capitalist of the capitalists, was first to see this. With us we have the perfect example: everybody wants a motor-car, a radio, a victrola; and wages are jacked up accordingly. They almost go up of themselves; the increased number of wants requires more labor to supply those wants; and though labor be "not a commodity" it is still governed by the law of demand. We are all "kerridge people"; and economic theories have to adapt themselves to our standard of living. The "economic man" won't stay economic—in America, at least.

Next as to the "margin of cultivation." We have only to look at modern transportation, the canning industry, cold-storage, market-gardening near great cities, modern agricultural machinery on our Western farms, some of these large as an English county, to see that much the same may be said of this second great economic formula. Moreover, all Ricardo's reasoning is based on the tenant-farmer; ours on individual ownership; which again brings a qualitative function into the equation. Ricardo's England was a close agricultural enclosure; Manchester a closed workshop for a limited number of "utilities fixed and embodied in material objects"—to quote Mill's famous definition of value—and both had only a definite, limited body of consumers.

Third, as to Malthus's theories; if all "Americanization" plans are carried out, and immigrants from countries of an earlier social epoch excluded, our population will hardly increase at all. And one doubts if even Malthus would have thought the Great War beneficent. While the progress of feminism tends to decrease the birth-rate.

Fourth, as to Karl Marx's "Iron Law"—it were more truly an India-rubber one. It is based on the theory that there are

certain fixed, non-increasable sources of wealth—principally machinery and mines, he takes little note of agriculture—which, with the Frankenstein monster, *das Kapital*, are always growing more monstrous and more and more tend to take, under a civilization of private ownership, the whole product of man's energies save the bare subsistence necessary if the multitude are to live and propagate their kind. Again, we see, this is true only of a poor and narrow "Kultur." The way out is by a wider civilization, which shall increase a man's needs, give him new tastes and joys, not diminish his life's to a brute's standard. Let every one require, not only the necessities of life but the luxuries, still more the higher satisfactions, pleasures of intellect or taste, schools of all kinds, books, music, travel, pictures, works of art about him, gardens, parks, theatres, playgrounds—yes, even flivvers and radios and movies, while he will—every artist's hand or writer's brain or teacher's time taken out of Marx's machine not only gives to someone light or joy but increases the dividend of the "wage-slaves" of Marx's "Iron Law." Lift up the masses till they insist on all these things, and the Old World may see what we are now beginning to see in America. Our only foe is narrowness, bigotry, intolerance; not machinery nor saved and reproductive capital, but class-selfishness and narrowness, standardization at the lowest level; poverty of thought and taste and feeling, levelling all men's desire to the lowest common denominator, to the comprehension of the "hick" or moujik, or at best but little higher, to the sanitary plumbing of a Babbitt, the literature and art of the colored Sunday Supplement. Russia is poor; Ireland is poor; our Southern "poor white" also; only because their education is such that their desires are few and their appreciation nil. And even our whole country is not yet up to utilizing the reservoir of all men's work, whether it be of head or hand, of art or craft, in mind or body; to the un-

derstanding and enjoying of all that can be thought or made.

Finally, coming to the most concrete subject, "over-production"—that bugbear of the orthodox economist; not yet vanished, in these high tariff days, the one economic proposition the plain man of business understands—it is a *non-sense*. There can be no over-production of things worth while. The answer is, make not less things, but different things or better things—things for a higher taste, a deeper mind—and educate the world and yourself to want them. As we have said, over-production (paradoxically perhaps) can only exist in the so-called necessities of life—meat, wheat, fuel, textiles, structural steel—and even then, it is only temporary. To say that any people, any place, does not want more, or at least more *kinds* of things, than it has, is to belittle human nature. Nor need the things be material, such as require a fixed industrial plant to produce them. And every non-material demand releases the pressure of Marx's "Iron Law."

You may say that this is merely an old idea—diversity of industry. Perhaps; but, like Christianity, it has never been carried out. And it is more than that; far more; it is diversity, development, recreation (the phrase is exact, re-creation, the making over) of mind, and heart, and soul. To confine it to the æsthetic sense is far too narrow; better call it the cultivation of the joy of life—more yet, the elevation by heart or mind to higher joys even than those of the æsthetic sense—finally, to the light of the soul—seeing that the world was happy, it "saw that it was good."

To begin, then, at the bottom: democracy, first of all, must enlarge its notions of *value*. Value is more than food and raiment—that were the moujik's state—more even than a house or a finer house, or money in one's purse—that was John Stuart Mill's—more even than idleness—that is the hobo's.

Ruskin\* was despised as a political economist; yet here he may help us, and so may many other moderns too, from the Cinque Cento down to Ferrero and Rodó; rarely, if ever, political economists. But it was Ruskin who most clearly bade (de Tocqueville somewhat anticipating) humanity revise its notions of *value*.

"The assumption which lies at the root of nearly all erroneous reasoning on political economy—namely, that its object is to accumulate money or exchangeable property—may be shown in a few words to be without foundation. . . . We must . . . define its aim to be the multiplication of human life at the highest standard. It might at first seem questionable whether we should endeavor to maintain a small number of persons of the highest type of beauty and intelligence or a larger number of an inferior class. But I shall be able to show in the sequel that the way to maintain the largest number is first to aim at the highest standard. . . .

"The perfect type of manhood . . . involves the perfections (whatever we may hereafter determine these to be) of his body, affections and intelligence. The material things therefore which it is the object of political economy to produce and use (or accumulate for use) are things which serve either to sustain and comfort the body or exercise rightly the affections and form the intelligence. Whatever truly serves either of these purposes is 'useful' to man, wholesome, healthful, helpful, or holy. By seeking such things, man prolongs and increases his life upon the earth. . . . For every piece of wise work done, so much life is granted; for every piece of foolish work, nothing; for every piece of wicked work, so much death is allotted. . . ."<sup>†</sup>

"The essential work of the political economist, is to determine what are in reality useful or life-giving things, and by what degrees and kinds of labor they are attainable and distributable"—he goes on; and Ruskin proceeds to an analysis of our conceptions of wealth, of money, and of riches.

\*The passages from Ruskin in this chapter (taken from the author's article, "Ruskin as a Political Economist," in the *Quarterly Journal of Economics* for July, 1888) are abstracted from his books, *Fors Clavigera*, *Munera Pulveris*, *The Crown of Wild Olive*, *Unto This Last*, and *Time and Tide*.

<sup>†</sup>*Munera Pulveris*, vol. I, VII.

Already, we see, we are carried out of the domain of the orthodox science. Political economy has become, as it were, *qualitative*, not *quantitative* merely,—and qualitative of other elements than money, as the mercantile school thought, or even than of wealth as defined by Smith and Mill. This is the first great change he seeks to make in the orthodox science, in the idea of what is really wealth, that is, of *value*. He accepts the old division of labor, and value, and money,  $x$ ,  $y$ , and  $z$ ; but says: "Your  $y$  (value) is not  $y$ ; to you it is but  $x$  plus  $z$ . In fact, you do not know anything about  $y$ ." He then seeks a logical definition of *wealth*: "The most reputed essay on that subject which has appeared in modern times begins, 'Every one has a notion, sufficiently correct for common purposes, of what is meant by wealth' "—what, he asks, would we think of a writer on astronomy who began his treatise by saying, "Every one has a notion, sufficiently correct for common purposes, of what is meant by stars"? There is not one person in ten thousand who has a notion sufficiently correct, even for the commonest purposes, of "what is meant" by wealth; still less, of what wealth everlastingly *is*, whether we mean it or not. Mill he quotes: wealth consists of all useful and (or?) agreeable objects which possess exchangeable value. What then is value? When used by political economists it has always meant only value in exchange (Mill, III, 1, p. 3). "So," says Ruskin, "if two ships cannot exchange their rudders, their rudders are, in politico-economic language, of no value to either?"\*

Moreover, usefulness and agreeableness underlie the exchange value, and must exist before we can esteem the thing an object of wealth. "Now, the economic usefulness of a thing depends, not merely on its own nature, but on the number of people who can and will use it. A horse is useless, and therefore unsalable, if no one can ride; meat, if no one

\**Unto This Last*, Essay IV.

can eat; thus every material utility depends on its relative human capacity. Similarly, the agreeableness of a thing depends not merely on its own likableness, but on the number of people who can be got to like it—that is to say, on its relative human disposition. Therefore, political economy, being a science of wealth, must be a science respecting human capacities and dispositions. But ‘moral considerations have nothing to do with political economy’ (Mill, III, 1, p. 2). Therefore moral considerations have nothing to do with human capacities and dispositions!”

He also combats the view that “anything which is an object of desire in numbers, and is limited in quantity so as to have rated worth in exchange, may be called or even virtually become wealth,” and that “the worth of things depends on the demand for them instead of on the use of them”—compare “an obscene French lithograph with a picture of Tintoret in Venice; the labor employed on the stone for the lithograph may have been much more than Tintoret gave to his picture, so that, if labor be the origin of value, the stone is the more valuable of the two. And, since it is capable of producing a large number of immediately saleable or exchangeable impressions, for which the ‘demand’ is constant, the city of Paris is, under all hitherto stated principles of political economy, richer in the possession of the lithographic stone than Venice with the picture.”

But no *Wealth* consists in an intrinsic *value* developed by a vital power; and the study of *wealth* is a province of natural science,—it deals with the essential properties of things. The study of *money* is a province of commercial science: it deals with the conditions of engagement and exchange. The study of *riches* is a province of moral science: it deals with the due relations of men to each other in regard to their material possessions, and with the just laws of their association for purposes of labor. And *wealth* consists of things in them-

selves valuable (the very word comes from *weal*) ; *money*, of documentary claims to the possession of such things (*not* only a 'medium of exchange' ; and coined gold is as much a document as a bank-note) ; and *riches* is a relative term, expressing the magnitude of the possessions of one person or society as compared with those of others. And now—what is *Value* ?

"*Value* signifies the strength of 'availing' of anything toward the sustaining of life, and is always twofold ; that is to say, primarily, *intrinsic*, and, secondarily, *effectual*.

"We must not confuse *cost* with *price*. *Value* is the life-giving power of anything ; *cost*, the quantity of labor required to produce it ; *price*, the quantity of labor which its possessor will take in exchange for it. Cost and price are commercial conditions, to be studied under the head of money.

"Intrinsic value is the absolute power of anything to support life. A sheaf of wheat has in it a measurable power of sustaining the substance of the body ; a cubic foot of pure air a fixed power of sustaining its warmth and a cluster of flowers of given beauty a fixed power of enlivening or animating the senses and heart. . . . But in order that this value become effectual, a certain state is necessary in the recipient of it. . . . The production of effectual value, therefore, always involves two needs : first, the production of a thing essentially useful ; then, the production of the capacity to use it. . . . A horse is no wealth to us if we cannot ride, nor a picture if we cannot see, *nor can any noble thing be wealth, except to a noble person*. As the aptness of the user increases, the effectual value of the thing used increases, and in its entirety can co-exist only with perfect skill of use and fitness of nature." (*Munera Pulveris*, I, § 15.)

Valuable *material* things, he goes on, may be conveniently referred to five heads : land, with its associated air, water, and organisms—we think we must add, ores and minerals, though Ruskin had very little use for them—houses, furniture and instruments ; stored or prepared food (Ruskin knew not of cold-storage) ; medicine, and articles of bodily luxury, including clothing, books, and works of art—a list

now chiefly notable for its omissions; where would he put flivvers, radios, victrolas, films?

Value depends neither on price, as when the owner of a galled jade paid for it his hundred pounds; nor on cost, as in the Paris lithographic stone; nor on caprice. And the wealth of the world consists broadly in its healthy food-giving land, its convenient building land, its useful animals, its useful minerals, its books and works of art.

"Value, from *valere*, to be well and strong; strong *in* life, if a man, or *valiant*; strong *for* life, if a thing, or *valuable*. . . .

"The real science of political economy, which has yet to be distinguished from the bastard science, as medicine from witchcraft and astronomy from astrology, is that which teaches nations to desire and labor for the things that lead to life, and which teaches them to scorn and destroy the things that lead to destruction. And if, in a state of infancy, they suppose indifferent things, such as excrescences of shellfish, to be valuable, and spend large measure of the labor which ought to be employed for the extension and ennobling of life, in diving or digging for them . . . or, in the same state of infancy, imagine precious and beneficent things such as air, light, and cleanliness to be valueless; or, finally, the condition of their own existence, by which alone they can truly possess or use anything,—such, for instance, as peace, and trust, and love,—to be prudently exchangeable, when the market offers, for gold, iron, or excrescences of shells,—the great and only science of political economy teaches them, in all these cases, what is vanity, and what is substance, and how the service of Death, the Lord of Waste, and of eternal emptiness, differs from the service of Wisdom, the Lady of Saving, and of eternal fulness,—she who has said, 'I will call those that love me to inherit *Substance* and I will *fill* their treasures.'" (*Unto This Last*, Essay IV.)

And the term "wealth" is never to be attached to the accidental object of a morbid desire, but only to the constant object of a legitimate one. It is intrinsic; but dependent, in order to be effectual, on a given degree of vital power in its possessor. . . . "Wealth is the possession of the valuable by the valiant" . . . hence, "the sum of wealth held by the



nation instead of being constant or calculable, varies hourly with the number and character of its holders." If here we seem a bit fanciful, we have not after all yet transcended the sphere of economics; so far as he places wealth in land or its products he merely reacts toward the physiocrats and Quesnay from Adam Smith; and many others before Ruskin had pointed out that Smith, after distinguishing value in exchange from intrinsic or effectual value, drops the latter from the case. Ruskin picks it up. And it is for our democracy now to learn what is true value. No one can better teach us.

What is productive labor? "That which produces utilities fixed and embodied in material objects," says Mill,—excluding at once literature, music, art, and much else. But this is only saying that productive labor is labor that produces a useful thing. What is a useful thing? This the older economists never discuss. The only definition Mill gives is "capacity to satisfy a desire or serve a purpose." But this applies equally to iron or silver; and the true definition, which Mill has not given but which nevertheless, says Ruskin, underlies the false definition in his mind and appears in his words "any support to life or strength,"—"applies to some articles of iron but not to others, and so of silver—to plows, not to bayonets, to forks, not to filigree."

And cost and price are commercial considerations, to be studied under the head of money (but not affecting civilization); labor, however, is, literally, the "lapse," loss or failure of human life caused by any effort, the *suffering* in effort; "that quantity of our toil which we die in." So *cost* comes from *constat*, the quantity for which it stands, but *price* is dependent on human will. Thus Ruskin forecasts our wider American experience, and almost discards the common "demand and supply" doctrine. Wages, and even prices, should largely be, and now usually are, regulated artificially. Unions, as well as voluntary action, have seen to that. And,

we now know, the wider the margin between wages and a necessary day's subsistence—which, we have seen, is all that narrow socialism demands—the greater purchasing power for things of art or joy, the less unemployment, the wider appreciation and the greater choice of occupation, the broader civilization. For all civilization is based on what, to the savage, are luxuries.

As to land, a man should possess what he can *use*, and no more; whether for food, beauty, exercise, science, or any other sacred purpose; possession of land implies the duty of living on it, and by it; so hold both Ruskin and Henry George.

With his refutation of the figment of "the economic man" most of us are familiar; but the sermon still needs preaching to the narrower socialists and labor unions. "No advantageous code of social action may be determined irrespectively of the influence of social affection." But the narrow economist says these are accidental and disturbing elements in human nature, while avarice is constant! so he would eliminate these *inconstants*, and, considering the human being merely as a covetous machine, "examine by what laws of labor, purchase, and sale, the greatest accumulative result in wealth is attainable. Those laws once determined, it will be for each individual afterwards to introduce as much of the disturbing affectionate element as he chooses, and to determine for himself the result on the new conditions supposed." "Modern political economy, assuming—as a science of gymnastics might, that was based on the theory that the body had no skeleton—not that man has none, but is all skeleton, founds an ossifant theory of progress on this negation of a soul; and having shown the utmost that may be made of bones . . . successfully proves the inconvenience of the reappearance of a soul among them . . . I . . . deny this theory's applicability to the present phase of the world." (*Unto This Last*, Essay I.) And even for mere mass production, "industry,

frugality and discretion are moral qualities and cannot be attained without moral discipline."

The common bit of misinformation about Ruskin is that (leaving out his art writings) he disliked machinery. But machinery, invention, contrivances, have no necessary connection with his economy, either political or as a science of life. Only that mere machines do not, so often as human hands and brains and hearts, make things of true value. On the one hand he places a society occupied in procuring and making over materials for food and clothing, convenience, even pleasure (the definition of true value being not forgotten)—and another, devoted to drilling men and creating munitions of war. Or he makes the famous comparison of the spring at Carshalton with the inn at Croydon; even the useless iron railing in front of the public house\*

"represented a quantity of work which would have cleansed the Carshalton pools three times over . . . but it was work partly cramped and deadly in the mine, partly fierce and exhaustive at the furnace, partly foolish and sedentary, of ill-taught students making bad designs; work from the beginning to the last fruits of it, and in all the branches of it, venomous, deathful and miserable . . . how did it come to pass that this work was done instead of the other, that the strength and life of the British operative were spent in defiling the ground instead of redeeming it, and in producing an entirely (in that place) valueless piece of metal, which can neither be eaten nor breathed, instead of medicinal fresh air and pure water? . . . Half a dozen men, with one day's work, could cleanse those pools and trim the flowers about their banks . . . but that day's work was never given, nor will be, nor will any joy be possible to heart of man, for evermore, about those wells of English waters. . . ."

It is because (and here he approaches Marx) the one work required machinery and plant, so that

"the capitalist can charge a percentage on the work in the one case and cannot in the other."

\**The Crown of Wild Olive*, Preface.

And finally, speaking for England, he complains that the tendency of the entire national energy has been to "approximate more and more to the state of a squirrel in a cage, or a turnspit in a wheel fed by foreign masters with nuts and dogsmeat. . . . The greatness of England does not consist in her coal. . . . I wish still to keep her fields green and her children's cheeks red."

As to spending, a man's power over property he possesses is limited to use for himself, administration for others, ostentation or destruction—and his use is sternly limited; the last two are equally detestable. Fortunes of great size can only be made by obtaining command over the labor of multitudes, or engrossing natural monopoly, as oil or coal. And it is not by mere chance—there is a divine reason—that *productive* labor—which is mostly agriculture, craftwork, art, letters—is far more difficult to engross or *accaparise*; and that it also leads its votary both to works of real value and to his own health of body and soul. The "moral element" for which he was derided, is still the economic right. And it is neither for the master's interest to pay low wages, nor for the laborers' to take too much; but all efforts to deduce rules of action from balance of expediency are vain.

"No man ever knew, or can know, what will be the ultimate result, to himself or other, of any given line of conduct; but every man may know, and most of us do know, what is a just or unjust act."

In education, science does not comprise it.

"You do not educate a man by telling him what he knew not, but by making him what he was not."

And finally,

"All effectual advancement towards this true felicity of the human race must be by individual, not by public effort."

Yet Ruskin is thought a socialist.

Here we may leave him; and we have only taken him as an example (similar and further thinking will be found in Ferrero, Rodó, Unamuno, Santayana) to show that our Way for democracy is not eccentric. And its first step must still be education, educating both to know and to be, what to do and what to like, what arts make for life, what things are of *value*. Let us choose the meanest of human organs—the stomach, the digestive tract. We are witnessing a vast popular revolt against the use of liquor, a moral uprising which with its extreme followers, as with the abolitionists, dares even the undermining of the very principles on which the Republic was founded. It is chiefly led by women. And yet theirs is largely the fault that brought on the need,—for let us now take perhaps the meanest of the arts—and the earliest—cooking. It lay in woman's domain. Yet any one, certainly any unprejudiced doctor, realizes that the cooked food served to the Appalachian "cracker," the denizen in the malarious Mississippi valley bottoms, the Yankee operative, by his wife—the fried black rind of hog, the saleratus bread, and now the delicatessen or ready-made tinned food—was largely responsible for the chronic distress or indigestion that drove him—not to wine, which unfortunately he did not know, or even, in the East and South, to beer—but to raw red whiskey. In addition, it was believed to be a cure for malaria; and of course it gave temporary relief—or forgetfulness—from chronic dyspepsia.

Nor let us dismiss such things as beneath our consideration. Good food is as much a necessity of good life as good air, good thinking, or worthy tastes. And democracy, to make a worthy people, must educate them not alone in vocational things—how to earn a living—but how to spend one. Its tastes, its desires, must be expanded in all worthy directions, to make the broadest possible basis for a civilization

where both handworker and thinker, mechanic and artist, scientist and poet all may be appreciated, and all "find their job."

But it is here that, according to our European critics, American democracy most hopelessly fails. They say, there are two opposite ideals for a modern nation: Power,—or Light; the American,—against that of Europe; or, as Ferrero claims, the German,—against the Latin. They would admit that we have not followed the Teutonic worship of war, force; but insist that our *Kultur* (the German word seems more appropriate than culture) is one of quantity, not quality; power, not light; machinery, not character; contrivances, not values. And mass production can only be of poor things, not masterpieces; material utilities, not spiritual joys; and they fear that American civilization is debasing European rather than learning from it.

"It needs little examination to see in all contemporary civilization two ideals: an ideal of perfection, and an ideal of power. The first is the legacy of the past, and is made up of different elements, of which the most important are: the traditions, intellectual, literary, artistic, juristic, political, of the Greeks and Latins; Christian morality, under its diverse forms; and the new moral and political aspirations of the Eighteenth and Nineteenth centuries. . . .

"The other ideal is more recent: it was born in the last two centuries as men were finding out that they could subdue and control the forces of nature in proportions hitherto unsuspected. Drunk with their successes, with the riches they have succeeded in reproducing so rapidly and in enormous quantities, thanks to a number of ingenious inventions, and the treasures they found under an earth now explored in all directions, by their victories over space and time, modern men have been brought to consider as an ideal of life at once beautiful, lofty and even heroic, the indefinite and unlimited augmentation of human power." (Ferrero, *Le Génie Latin et le Monde Moderne*, pp. 12-13.)

"Latin genius showed its originality and its power and won its chief glory in laboring to realise certain ideals of perfection, that is in creating the arts, literature, religions, law, the organised

State. Latin genius must be identified with the irresistible tendency which leads peoples or individuals to desire all the forms of perfection of which man's spirit is capable." (*Ibid.*, pp. 13-14, abbreviated.)

"The ideal of power may on the other hand be considered just now (1917) as a Germanic ideal . . . not that it was created by them; they contributed less than France to the long and sad labor which brought to birth that ideal in the world. But it is not questionable that, if slow to grasp it, Germany has ended by becoming its leading champion in the world, these last thirty years. The immense development of Germany which has so surprised the world is nothing but that new ideal of Power, transformed by them into a kind of national religion . . . no longer in industry and business, as the Americans have done, but in the world of ideas, and—its most dangerous application—in that of war." (*Loc. cit.*, pp. 14-15)

And the Italian goes on to ascribe the World-War trouble to the mixing, the confusion, of these two ideals; to supposing that they could be developed indefinitely and peaceably alongside of each other. But England was also to blame. The decline of the ideals of perfection and the increasing prestige of the notion of power are the marked characteristics of the thirty years before the War, and were partly brought about by the great growth of the British empire, the exploration of Africa, the development of the two Americas. (He might have added, the exploitation of savage peoples.) Then too, the increase of population, expenses for armament, which made necessary an augmentation of production, and the decline of those institutions (the church, the aristocracy, the artistic world) which in Europe represented the spirit of Quality, the ideals of perfection; and finally, the coming into power of the laboring classes. "Left to themselves, all the old disciplines removed, the slightly educated masses would naturally lean rather toward the ideal of power—which satisfies the elementary instincts, pride, cupidity, ambition—rather than to that of perfection, which demands always a certain spirit of sacrifice and strength of renunciation" (p. 17).

And the object-lesson of Germany hypnotized the world by its vast successes into belief in the doctrine of Power. "What mattered it if already in 1870 it had resuscitated the ancient barbarous soul of War? Developed its commerce by dumping, *Ersatz* goods, deterioration of quality?" The ideals of perfection had been dropped, with all standards of real value. Then came the immense catastrophe of the War—"to show the world that it is not possible at the same time to will unlimited augmentation of power and a continual moral progress; sooner or later the moment comes when it is necessary to choose between justice, charity, loyalty, and force, riches and success" (p. 29). "But the most grave difficulties of our modern society, against which many ingenious theories of solution are proposed, might be solved by the simple application of the principle of Loyalty—if that, in its broadest sense existed, all these evils would vanish" (p. 41).

But that is too much to ask; as well expect the world to become in practice Christian.

Ferrero's charge against machine civilization is artistic rather than humanitarian. We necessarily consider quantity, not quality; the machine produces much, and quickly, the hand little and slowly, but it can attain a degree of perfection to which the machine cannot pretend. No man will ever invent a machine that will carve a Venus of Milo, or weave the marvellous tapestries that we see in European museums; all perfect things are made by hand; but neither can the hand approach the machine in multiple work or speed. Therefore, in a civilization dominated by mechanism, men will ever try to hurry more, producing quickly, consuming recklessly, not too much regarding the quality of what they make or take; provided the goods look well, they will not require great perfection in detail; rather would they often renew flimsy products than have only one, though durable and well finished. It follows that continual changes of taste, easy forgetfulness



of traditions, abundance, mediocrity, are the characteristics of a civilization dominated by machinery; great works of art, the glory of the ancient world, will disappear and it will be the triumph of an innumerable quantity of objects, of a quality "of sorts," offered to the greatest possible number.

"One might truly say that falsification has become for our civilization a sort of second nature. What, at bottom, is this great modern industry but a continual falsifying of products, destined to mask the inferiority of a hasty production where quality is sacrificed to quantity? Day by day the number of falsified products increasing; science, and, in particular, chemistry is the well-paid accomplice of this colossal '*trompe-l'œil*' made for a greedy but simple and inexperienced public" (*ib.*, p. 237).

Moreover, the vast increase of wealth without the responsibility to one's dependents or others that landed possessions formerly gave; residence in great cities without neighborly duties, where one is unknown, easily hidden from obligation or criticism, money each day having more influence over souls because more generally distributed and more urgently desired; all tend to destroy the great work of morality and purification of life that Christianity accomplished; step by step we are returning to paganism with all its temptations and all its dangers. And, in America, Ferrero concludes, is the best field, unencumbered by ancient tradition, in which to study this dangerous tendency. The Latin spirit, the spirit of order, reason, clarity, was overcome by the Germanic in the decades preceding the World War. So the Italian agrees with us that America is the place to study; it is for us in America to choose our side.

"If we do not succeed in elevating the moral tone of Europe, this civilisation of iron and science will end in a kind of gigantic suicide."

That Europe is being Americanized this way is undeniable;

but all Europeans, says Ferrero, are not satisfied, for this idea of progress is to them revolutionary. The upsetting of standards and manners it is making is almost comparable to that produced in classic times by Christianity. And after a long exposition of the value (in our sense) to humanity of Art, he concludes:

"We shall see that it is far more easy for our epoch to produce new riches than to employ them to create an elevated civilisation."

Let us now see what a German says. If the world be now on a wrong road, he naturally does not admit it was led there by Germany. Otherwise he is not so far from the Italian; though his style is clumsier, and his thought appears to me less lucid. Therefore, we will quote him in smaller type:

(Keyserling, *Travel Diary of a Philosopher*, N. Y., Vol. II, p. 264.)

"We have run ahead of our being by our institutions. Our intellect has recognised as desirable for every one what only a saint would strive after from inner and personal stimulus, and it has invented a machinery which secures the realisation of what is desirable automatically. The disadvantages of this method are obvious: the possibility of realising what is good externally makes us superficial, for where this opportunity exists, man grows accustomed to expect all salvation from external circumstances, and neglects his inner culture correspondingly . . . our system, by which the spiritually immature individual . . . professes virtue by his own incentive, . . . the possibility exists that precisely the mass may attain to the position where hitherto only men born in favorable circumstances used to stand. . . . Thanks to this, an extraordinarily high percentage of white men born on a low level have risen to a height during one century . . ." (p. 267). "The barbarity of modern men is explained by this . . . our cultural system may one day develop so far that all men will start life as Brahmins, this must be placed to the credit of the ideal of equality, no matter how much in other ways it lowers humanity and makes it superficial. If the present condition represented a final stage, then it would have to be opposed by all means; the levelling downwards which democracy inevitably

effects, brings with it an enormous lowering of the value of humanity, and the continuation of this process would spell ruin. However, it will not continue; democracy signifies only a working hypothesis, which will disappear of its own accord when the time is ripe. . . ."

(270) ". . . we have to purchase our higher originality in individual cases at the expense of a greater imperfection of the average . . . the struggle for innovation moreover makes men superficial; the man whose attention is pinned to the transformation of appearance easily loses contact with his depth. The more inventive we are, the more superficial we become. . . ."

(272) ". . . our concept of progress is not adapted to the processes of nature . . . not only do plants and animals remain the same by their own virtue through æons of time, and change only in reaction to a transient outer world; the same thing is true of human beings everywhere where no physiological 'beyond' controls their lives; thus, Russian history from the fifteenth century until yesterday, surveyed from the point of view of man and his motives, shows nothing but repetitions."

(284) "We are more materially than spiritually minded, because we have not yet got beyond the period of spiritual growth; we are materialists as children are . . . if it is the mission of man to bring about spiritualisation, our materialism has a greater value for the future than the spirituality of Hindustan, powerless in the face of nature; it does not control her; for this reason, it cannot spiritualise her. We may succeed in this. Only our path leads first into the very heart of matter. We must enter into and pass through all that over which the East has risen with a single leap. We must be materialists for the time being."

(351) ". . . totality is the end of all development, no kind of perfection excludes the rest. . . ."

(359) "So it may happen precisely where humanity seems most deeply entangled in matter its vanguard will first get beyond all bonds of nature . . . our present materialism is verily the guaranty for our future spirituality. The suitable body for this has already been prepared in America of today. . . . It will not recognise any rigid forms, and will allow absolute self-determination to everyone. . . . It will, in rising above all nature, and in taking account only of what springs from the spirit, even realise the ideal of equality. In the United States the outer form has run far ahead of its content—which happens always where it does not lag behind. . . . Slowly, very slowly, the soul grows into its body. . . ."

## CHAPTER XII

### AMERICA'S WAY

De Tocqueville begins his second volume by saying :

"I think that in no country in the civilized world is less attention paid to philosophy than in the United States." Yet, he immediately adds, "To evade the system of bondage and habit, of family-maxims, class-opinions, and, in some degree, of national prejudices; to accept tradition only as a means of information, and existing facts only as a lesson in doing otherwise and doing better; to seek the lesson of things for oneself, and in oneself alone; to tend to results without being bound to means, and to aim at the substance through the form . . . such are the principal characteristics of what I shall call the philosophic method of the Americans."

Why not call it a philosophy?

Yes; we are radical; gloriously radical; unhampered save only by our tradition of liberty; hardly now even by the Constitution itself, it proving so easy of amendment. But is it always now true, as he goes on to say, that "in most operations of the mind each American appeals to his own individual understanding alone"? or that "as the influence which the intelligence of one man has on that of another must necessarily be very limited in a country where the citizens, placed on the footing of general similitude, are all closely seen by each other; and where, as no signs of incontestable superiority or greatness are perceived in any one of them, they are constantly brought back to their own reason, as the most obvious and proximate source of truth"? (Vol. II, p. 2.) Are we not rather losing our individualism and de-

veloping instead the mob or sect spirit, or at least that of "Main Street"? Then, most women, and some men, are devoted to a "Cause." The others have no time for—or take little—thought.

The French prophet goes on, "Men who live in ages of equality have a great deal of curiosity and very little leisure; their life is so practical, so confused, so excited, so active, that but little time remains to them for thought. Such men are prone to general ideals"—(he says, *ideas*, but I question this)—"because they spare them the trouble of studying particulars." (*Ibid.*, p. 16) As to ideals only, e. g., socialism, that seems true; general *ideas*, the average man rejects as "highbrow."\*

So we seem left to cults, propaganda, agitators. Can the highest civilization be engendered by the clash of "Causes"—any more than wise and stable government out of the clash of "groups" in the French Chamber of Deputies? perhaps; we shall see. But certain it is that we need more "all round men"—for they are wisest; not, in such matters, the specialist. And these only education—and education of the broadest, the most liberal, kind—can give us. For, "when the inhabitant of a democratic country compares himself individually with those about him, he feels with pride that he is the equal of any one of them; but when he comes to survey the totality of his fellows and place himself in contrast with so huge a body, he is instantly overwhelmed by the sense of his own insignificance. . . . The public has therefore among a democratic people a singular power, of which aristocratic nations could never so much as concede the idea; for it does

\*"It would seem as if the mind of the English could only tear itself reluctantly and painfully away from the observation of particular facts, to rise from them to their causes; and that it only generalises in spite of itself." De Tocqueville, II, p. 13. And a hundred years later the German diplomat, Luxburg (of *spurious versenkt* fame) complained to the writer: "The English have no general ideas!"

not persuade to certain opinions, but it enforces them, and infuses them into the faculties by a sort of enormous pressure of the minds of all upon the reason of each . . . In the principle of equality I very clearly discern two tendencies; the one leading the mind of every man to untried thoughts, the other inclined to prohibit him from thinking at all And I perceive how, under the dominion of certain laws, democracy would extinguish that liberty of mind to which a democratic social condition is favorable; so that, after having broken all the bondage once imposed on it by ranks or by men, the human mind would be closely fettered to the general will of the greatest number. . . . There is, in this, matter for profound reflection for those who look on freedom as a holy thing, and who hate, not only the despot, but despotism. For myself, when I feel the hand of power lie heavy on my brow, I care but little to know who oppresses me; and I am not the more disposed to pass beneath the yoke, because it is held out to me by the arms of a million men." (*Ibid.*, pp. 9-11.)

To escape the French prophet's gloomy conclusion, we need learn, I think, only two things—we must learn to think truly—and we must learn to truly value.

It is generally accepted as a truism that the marvellous mechanical and chemical discoveries and inventions of the last century have been of true value to man. Yet it must be pointed out that they—with the coincidental discoveries of mineral oil and the uses of rubber gums—have mainly served to accelerate or facilitate physical motion—transportation—whether of people or things or ideas or sounds or speech—and the sinister ends of war. Poison gas has killed more men than radium has saved. And to the Divine eye, the spectacle of millions of humans consuming the stored energy of the earth in whirring aimlessly about in motor-cars—now for the most part closed even to natural beauty—

must only resemble the purposeless evolutions of a swarm of flies in a beam of light.

Now no one would deny the uses of mere transportation—commerce, even manufacture, is but the assembling of things in timely juxtaposition—raw material, human beings, in high civilization also their ideas, must be moved, multiplied, to reach others—but, in our sense, no new *value* is created. Nothing is added to the health of the body, the wisdom of the mind, the beauty of the world—that was not there before. But we are all now dazzled—misled to think these things a real human gain. As well consider the art of advertising a *productive* industry. It may be useful, even beyond selfish advancement; but *the goods must be there!* All wealth, said the physiocrats, comes of the earth. Well, we democrats of the twentieth century, denying the Economic Man, must learn that there is other wealth, of true value—to the mind, the heart, and, shall we add, the soul? And very little have we to rise above the primal curse of labor, to see that it is the labor for these that makes life worth living and their service only that is perfect freedom. For labor—mechanical, trivial in immediate result (as when the worker in a great machine-shop continually adds but one part), repeated endlessly day after day for a lifetime—is, we moderns will admit, a curse. Even the man with a hoe is better off—for he turns from the hoe to the seed or the scythe—he makes an entire thing, wheat—he is therefore a creator, *poietes*, in its original sense, as much as the painter of a picture. So your older artisan, though it be but a perfect pair of shoes, and made in the sweat of his brow, takes pride in the result as much as any Benvenuto Cellini in his finished cup. We will admit that the Yankee simply detests mere physical labor, in field or factory, as it now is; but he is right in doing so.

Therefore, our advance in machinery, so far as it saves labor (and does not deteriorate the product) in transporta-

tion, whether of men, goods, sounds, or speech (so far as it does not tend to standardization, stagnation, or the cheapening of thought, music, speech or art to the present mind or taste of the largest multitude)—is indeed of true value to man; and in ways, one hopes, hardly yet imagined. Even Ruskin admitted that labor ("fierce and deadly in the mines") was so much death—though he was willing enough, with the Oxford students, to work in the open air on roads—I shall go further, and admit, that soulless toil, mere destruction of human vital force in manual or in mental labor, without joy or pride or present result to the worker, is indeed an evil; and any machine that minimizes or removes it is a true creator of "value"—a creator, a releaser, of just so much life. And the latter word brings us to the greater, wider result: that just so much of human life or leisure is thereby set free for higher things. This is the thought that has never been sufficiently carried out, and that democracy must learn to truly understand, if it would live and soar—not ultimately sink to the ground,—like the Chinese kite!—But, "America's way," Ferrero thinks, is different. First struck by this in South America, he wrote, "*Between the Old World and the New*," and after visiting North America, "*Le Génie Latin et le Monde Moderne*." Too many books of impressions are written on the two Americas, he says, and the public is rightly tired of them; "but why should I not try in a work of art to oppose, one to the other, the two conceptions of progress: that which America has created and tried to impose on the world, and that which the classes faithful to tradition still hold up in Europe and should seek to defend?"

The first thing that strikes him in New York is a visit to a lady in a thin-walled apartment, of high cultivation herself, but living most uncomfortably. "A woman of her attainments living on her pen in Paris or Rome would certainly



gain less, but would have better food, service, lodging, and, if married to a man of like means, could afford to have children." Of what use then, he asks, are riches, if they are not a means to live more easily, get comforts, even a few luxuries? How is it that America, which has showed so much energy in exploiting the immense riches of its territory, has not thereafter known how or been able to convert them into "*bien-être*" for all its people? How is it that in that fortunate country, those classes which suffer most are precisely those middle classes which still have more hand in their government than in any country of Europe? And how is it that in those poor European countries, both these classes and the people are more satisfied with their lot? (We would doubt the last—save only for the American's obsession to make a fortune,—in England he only tries to "better himself.")

It will be seen that even on the most material side our civilization has its critics; but I may leave the refutation to the reader. Since 1908 when Ferrero wrote the above, one at least of his complaints (the lack of service to the unfortunate lady his hostess) has been largely met in the typical American manner of a new invention—the manifold uses of electricity. But we must not deceive ourselves, nor live in a fool's paradise, thinking our country the highest civilization, only because we do not know others.

Our first part has taught us that the great danger of our democracy is what Lieber called "Mandarin government," and the resultant loss of liberty. The great lesson of this second part, our *qualitative* study, is that we should not rest content with a *civilization of contrivances*. Leaving out one great field of achievement—medical and surgical discovery—most of our many inventions are merely that. All they come to is transportation—whether of things, humans, sounds, pictures, ideas—and machine-production of goods already—and usually better—made by hand. In so far as

they free mankind from brute toil, they are of *value*; but only indirectly, if the human leisure thus created is used for things of *value*,—always using this word in Ruskin's sense. Is democracy headed in that direction?

Believing still that in democracy—leaving Christianity aside—lies the only hope of the world, I would firstly demur that its failing here is not peculiar to a democratic society. There is a world-wide standardization to-day, in amusements as well as dress or culture. In 1912 I went from Framingham, Mass., to St. Petersburg. In both places men worked in the mornings, went to a country club for golf in the afternoon, and played bridge at night; at Framingham and St. Petersburg the women spent their leisure in gossip or flirtation, only a little more seriously in both latters. At Shanghai and Philadelphia the men's customs were precisely the same, save that they consumed more cocktails at the Shanghai than at the Philadelphia club. And Russia was an autocracy, nor was China in our sense a democracy. Coming more to the people, the only difference was that in America they sat at baseball matches or the films, in Russia at the horse-races, betting being there allowed; for, as we have seen, democracies tend to grant less personal liberty than autocracies; moreover, however great the social evil, "it helps"—as a Russian ambassador remarked to me—"to keep the people quiet to let them gamble at the races, drink vodka, spend their leisure and their substance in their own way. Otherwise, they might be holding political meetings." But, in a democracy, we do not have to "keep the people quiet."

Thus few would say that in our increased leisure, with our freed energies, even in countries where as with us the release from brute toil is most remarkable, we have so far created much of *value*, certainly not any *new* value, in things or in thoughts, to human life. Indeed it has been often urged that the Florence of the fifteenth century, the Athens of the fifth

B. C., without either machinery or chemistry, but with individual handicraft and large leisure for thought, gave more of *value* to the mind and the soul, and far more beauty to life, than do Chicago and Pittsburg, or even the prairies of Nebraska.\*

Let us not be narrow, though. Granting that machinery, efficiency, have released us Americans from, let us say, four hours per diem of work that was necessary two centuries ago; suppose it is spent in golf or at the films; in Lancashire they would have spent them at cockfights or bear-baiting, in Glasgow on whiskey. In so far as afternoons at golf make for physical health, it is, within our definition, a thing of *value*—i. e., making for life. The business man is less tired, probably lives longer (I wish the life insurance companies would advise us on this point)—and his belly decreases while his brain does not. The films too have their value, in so far as they produce worthy things; the radio still more—as being at least addressed to the mind, not mere picture-drawing (for the same reason that the invention of letters must be considered to mark a higher stage than the cave-man's drawing on a reindeer's horn), provided only the loudspeaker seeks to raise, and not descend to, what we have termed the highest common denominator in taste or thought—which, we are informed by serious newspapers, is, in the United States, about that of an average high-school boy aged fourteen. Many newspapers and magazines ruthlessly reject or blue-pencil anything that he cannot understand.

\*Spengler, our latest prophet, goes far beyond Ruskin in his hatred of the machine.

"Man has felt the machine to be devilish, and rightly. . . . Only this our culture has achieved it, and perhaps only for a few centuries. But for that very reason Faustian man has become the slave of his creation. . . ."

Ask any American housewife.

But Marx agreed with him, "It is the proudest creation of the Bourgeoisie—every non-European abhors it—the Russian looks with fear and hatred at this tyranny of wheels, cables, and rails. . . ." (*Decline of the West*, vol. II, 504.)

True, it must come to be something more than what we have called a "civilization of contrivances"—or even, perhaps, of universally disseminated comfort; though that would quite have satisfied Marx.

The Germans are, some would think, a shade better; true, they take less leisure, but they spend it, with their wives and children, listening to music, and drinking beer; the French, far from their wives, at the café, over dominoes and talk, but very little drinking; so all Latin peoples, though the Spanish and Italian, having more imagination, mostly take to games of chance. On the whole, one sees little progress yet, anywhere. But democracy must learn how to wield its magic ring—to wish for the right things,—or endless and irremediable will be the grief it comes to. Assuming the present inequality of fortune to continue, the greater number, if their minds are fixed on these material possessions alone, will more and more lean upon “direct action”; if equality in material possession is realized, there will result a drab and drear discontent with all that their narrow civilization affords, more dreaded by the profound de Tocqueville than the greatest disparity of fortune, driving men to excess or debauchery from very ennui; a condition we even now see somewhat foreshadowed in the present license of the sexes,—for wine may go, song be silent, but woman will remain—what else is there to get interested in? assuming there be no higher life, no thought, no culture, no religion. Will even Babbitt be always content with his game of golf?

Yet it is not so easy, when we come to the concrete example, to picture a world, as in *Looking Backward*, that will attract him. Just as the perpetual psalm-singing of the Orthodox heaven fails to allure the scoffer, so the broader æsthetic, deeper spiritual life fails to stir the mass of men. It is easy to talk in the abstract; but he will demand definite description. Shall we say, more (and cheaper) symphony concerts, pictures; better books, statues, plays; profounder thoughts? How many of us, the present writer included, would give up every afternoon his game of golf for a concert by a string quartet? Only the true scientists, the professor giving up his gained leisure to research work, the doer

of good works, the lover of nature, may so far be counted on. As every impresario, manager, film-producer, publisher, will tell you, we must educate the people before we can create better things, higher thinking, purer joys. Can you get one fan of a thousand, in England or here, to leave a baseball or football match for the art museum, though it were for that day only?

Then there is the increasing abhorrence of the "high-brow." That is a very serious and dreadful portent. The fact that there should be popular applause of the phrase to ridicule all higher thought or taste—as in many of our colleges the "greasy grind" is held up to general contempt—is, alas! peculiar to our democracy; it does not even exist in England; in most respects in general culture inferior to us (you will find no books in an English middle-class house,—any more than bathrooms!). The South American writer Rodó wrote a whole book to illustrate this defect of the North American—even anticipating Mr. Lewis's *Babbitt* in his *Monsieur Homais*—and when the present writer translated *Ariel*, hoping to bring to our notice this lovely masterpiece of Spanish contemporary culture, we had perhaps a thousand readers:—the original had five hundred thousand in South America!

Yet let us be catholic. A great deal of nonsense has been talked about "culture" since Matthew Arnold's day. The fine arts alone are not necessarily elevating. Broadening to civilization, yes; and thus of vast economic value (we shall come to that in our next chapter) but not of themselves constructive of either soul, character, or even (saving perhaps the best literature) the heart. A Beethoven symphony will seem to uplift you for the moment—but it leaves you flat. So Emerson remarked that the emotion caused by a great tragedy was positively bad, if not followed by action. Musicians (Paderewski always excepted) are notoriously weak in character—Chopin, Liszt—painters only created the *vie*

*de bohème*—what writer even has been a great figure in civic life? Disraeli, Goethe? but he was only a petty German courtier, and the other a ridiculous novelist. Few would intrust our future to a Shaw or a Wells. But at least, you will say, love of music and art keeps a man from worse things? So does golf.

Yet there is a fixed and permanent belief, even in these days of the scorned "highbrow," that those joys are in some way better, higher than sensual pleasures. So, we feel, is beauty; though the pursuit of it as the only aim in life will lead an Oscar Wilde or a Pater one way, Ruskin another. Yet we feel sure there is some divine leading to light, to joy. We human intelligences are but as dogs before human speech; we are not given to comprehend God's language; yet we know that the message is one of love. Deeply as it moves us, we do not even understand the language in which music speaks. But our seers, our poets, do dimly apprehend. A Dante will say God's paradise is light; a prophet that Christ's life is the light of the world.

A life of good food and comfort and play will content a puppy; not long a human soul. The present-day American, competing all day in his business, seasons his tasteless life by like competition in his play; if for a stronger relish he seek ostentation, vanity, he brings a poison in. One may assert boldly that all wealth which is spent wholly for show, merely to inspire the envy of others, to do or have things useless in themselves, merely because others cannot afford them, is thoroughly evil. Beauty alone can justify superfluous possession; because beauty may be shared, it after all belongs rather to the appreciator than the possessor; and somehow we feel sure that beauty is a good, by Divine intention; otherwise how explain the lovely vesture of this world? In that Hebrew psalm, whose writer seems even to have foreseen that doctrine of evolution so troubling to our funda-

mentalists, we read, *The earth . . . shall perish, but thou shalt endure: they all shall wax old as doth a garment; and as a vesture shalt thou change them. . . .*

Let us boldly assert then that these things are good; far from minimizing their number, let us increase the variety of things of beauty, enlarge, not minimize, the objects of pure joy, grow higher, not more average, in thought or taste, that from the very welter of our present material possessions we Americans emerge higher of brow and loftier of soul—yet never forgetting in our æsthetics, as Pater did, our ethics. But the best of “good works,” the most intelligent of all charities, is to banish poverty, make material charities unnecessary. That is the lesson that American democracy is privileged to teach the world. But it must not forget the teachings of the old world, above all the older world of Greece. It must teach its citizens to desire more, and higher, things,—not fewer and coarser; the love of nature as well as the sport of killing; the study, in history and all literatures, of humanity, as well as of electrons; the making of men and women as well as of public utilities.

And that Americans will do this, our greatest critic foresaw:

“An American attends to his private concerns as if he were alone in the world, and the next minute he gives himself up to the common weal as if he had forgotten them. At one time he seems animated by the most selfish cupidity, at another by the most lively patriotism.”

But he did not see—nor do Ferrero or Spengler see to-day—that to make, by its very material success, this higher life possible for all is America’s lesson to the world.

## CHAPTER XIII

### AMERICA'S LESSON. THE MARXIAN LAW

That the economic hope of humanity lies in the desire for more, not fewer, things—in the desire for enlightenment, pleasures, even luxuries, beyond the bare satisfaction of material needs—this is the extraordinary discovery of American social equality, transcending and rendering unnecessary Marx's "Iron Law," as the advancing wave surrounds and overcomes a child's sand-castle on a beach. Probably also—at least we occidentals will think so—it forever abandons that wisdom of the East which deemed submission, passivity, the rule of conduct for this world. For Judaism, Christianity, Islam, are after all religions of action, have spread mainly Westward—for religions of passion, suffering, nirvana, we must go to the farther East. But as we develop economically, increase production and the number of our products, our democracy, for all its social equality, must never forget the lesson we have, however inadequately, tried in our last chapter to explain. Mass production is not the last word. The last word is: production of true *values* to life—body, mind, or soul.

All Karl Marx's pessimism is only true in a narrow civilization. Expressed briefly again it is, that as all man's economic production (the use of that very word *economic* already lets in a rift of light) is increasingly, and in increasing part, due to machines, costly machines (omitting here natural monopoly, for in regard to it his thesis remains true, but it has to-day no defenders), the share of the laborer will grow less and less, the reward of capital more and more.\*

\*Now we are showing the contrary. The greater the multiplication of machines, the larger the reward of labor. With wages—word abhorred of our syndicalists!—you buy a man. A man is of greater value than any machine, and



Already America has given the lie to this, even in our present imperfect culture, our lauded mass production of a few only, even of what Mill called "utilities fixed and embodied in material objects."\* Yet Marx's law would still have truth, were we limited to the tastes and desires of a merely "Babbitt" civilization.

Let us consider civilization as it existed in Victorian days, *plus*—let us suppose—the automobile, the cinema, the telephone and the radio. For a time—and that is the stage we are now in—the vast number of laborers taken from the field, shop or factory will greatly increase the wages of those who remain, always provided that there is a universal desire, coupled with purchasing power, for the motor car, the movie, the telephone and the radio. It was that, the genius of a Ford foresaw; and counted on. The universal desire sprang into being; and those same higher wages, caused by this diversion of labor to new fields, multiplied the purchasing power. Europe rubbed her eyes, yet could not understand it. Yet the reason is so simple! It is just because the American people *wanted* so many things that they got them!†

more and more, in our "machine civilization," we are learning that. As our human proportion in production shrinks, his reward is greater. The greater the material plant, the larger the human wage; and more and more his art, his direction, his invention, are needed. It even reacts on his work without mechanical aid—how much more we reward the man who can hand-forged an iron *grille* than we did when only such forging was possible!

\*"Modern poverty is not the poverty that is blest in the Sermon on the Mount . . . such as we have today in all great cities degrades the poor and . . . infects the whole neighbourhood in which they live." (Bernard Shaw, *The Intelligent Woman's Guide to Socialism and Capitalism*, London, 1928, p. 42 )

Shaw is thinking of London and Glasgow. He has never been in America. We hope to show Western cities in which there are no poor, except the ill, infirm, or idle. And it is "many inventions," with education, that will do this.

†On this point we part company with Ferrero; in fact, that part of his argument is an excellent example of the old economic hopelessness before America showed the light. Still looking back to the fall of Rome, he likens our present growth in things possessing utility or giving comfort, or release from toil, or even pleasure, to the taste for luxury that brought corruption and destroyed that empire. That is "the continual increase, automatically, one might almost say, which each new generation produces of ambitions and desires, preventing humanity from *crystallising itself*, obliging it to transform itself continually in the order intellectual or moral!" (The exclamation point is our own: we cer-

Even England had never discovered this *home* truth. They had partially approached it when, in the coal-and-factory age, they taught, and tried to teach, other peoples to want the textiles, iron-mongery and other toys or utilities they could cheaply turn out with their new machinery. But they never generalized; they were not inventive, and had no art. In liter-

tainly do not "crystallise"—we should consider it stagnation.) And he goes farther. "The continual augmentation of desires and ambitions which at the opening of the twentieth century condemns us all to the most intensive toil"—and compares it to the *avaritia, ambitio, luxuria* of the Romans, translating these terms by "the fury of gain," "*l'arrivisme*" (the irrepressible impulse under which all men force themselves to rise to a situation superior to that wherein they were born) and the passion of increasing always comforts, pleasures, and luxuries

Our whole contention is that the American lesson is exactly the opposite of this; and that, provided only the "pleasures" be of value (i. e., life- or joy-giving), even they, to say nothing of the "comforts," are not only ethically justifiable but economically tend to the general dissemination of wealth.

But let us go on; his thought is at least suggestive. He thinks that the ardent conflict between the puritan tradition and a civilization of money is disappearing with us, and predicts that, as Rome perished in her conquests, losing her military and political virtues which were of her very essence, so our civilization, after becoming capable of producing wealth, thanks to a *kultur* (again we use the German word, keeping *culture* for a different sense) perfected by decades of efficiency in mechanical production, is now, little by little, destroying all culture in the true sense, burying its most noble constituents—art, literature, philosophy, religion, lofty governmental ideals—under the alluvium of new riches hastily produced, "in sacrificing to the advantage of mere quantity, which alone is appreciable to the general, that *quality* whose standards of measure can never be exactly defined in a manner beyond discussion, and which, for that very reason, is a perpetual cause of disagreement at the same time that it is the unique source of true greatness." (*Le Génie Latin*, p. 104) And if (under America's lead, as he thinks) our century is profoundly materialist, all the more it needs the common elements of culture in which the élite of civilized nations can take contact, become united, penetrate each other more profoundly than in the momentary promiscuity of sumptuous hotels, brief international congresses, or a general mania to fly over each other's roads in automobiles.

Yet it is now a commonplace, even to European observers, that America, however materialistic her culture, is ethically the most idealist country in the world. And even then Ferrero was almost first among them to say:

"It is not rare to see an American consecrate all the force of his intelligence, with all his fortune, to uproot evils which a European would consider hopeless for his efforts; and with the conviction of succeeding in reforming nature (or human nature), elevating it, purifying it, which seemed often, even to me, to border on the Utopian. At bottom, even in social work, the American always appeared to me more idealist than the European, more capable of engaging in the warfare against evil, without being sure of having means adequate to conquer it, but animated with a great faith in the Good—more mystical and less practical."<sup>2</sup>

ature, in the dissemination of intelligence, they were pre-eminent; and this helped. Yet even in the fat content of that Victorian prosperity, discontent appeared, and Marx was justified. But the British trader and cotton-spinner thought it might go on forever. John Bull and most of his children got their tea and coffee, sugar and spice, cotton and jute, at slave or peon or ryot prices from the tropical world, against machine-made utilities—or glass beads, brass jewellery, or other “notions” (the Yankee phrase is a good one); moreover they had, after iron ships came in, the carrying trade of the world. America, “practical” America, is in somewhat the same state of mind to-day. And doubtless the new notions from Detroit will excite the acquisitiveness of the outer world as much and as long, as did the brummagem from Birmingham.

But we Nordics are living in a fool’s paradise. A quarter—since Russia went, hardly an eighth—of the world’s people are getting all their raw material but coal and iron, certainly all of any *value*, from the tropics, from savage labor or exploitation of backward peoples. How long will it last? At the present wage or rate of barter it means one day’s African or Chinese labor against a few minutes of labor in Detroit!

This fecund thought I owe to a Guatemalan writer, but though India has already her cotton-mills, and Japan her munition factories, we will leave, for the present, all consideration of the yellow economic peril—which, however, we cannot ultimately escape but by doing rarer and finer things ourselves—and return to our main line of thought. For as long as we can tease or tickle a billion people to thirst for our contrivances, the other two hundred million in the “civilized” countries may follow America to our present economic paradise—where the unskilled laborer gets his pound a day, the artisan two pounds, and we all own our motors and kitchen

utilities—and that, remember, simply because we, though in a “capitalistic” democracy, have wanted them. Only the clerk or the teacher indeed may lack somewhat of all these new necessities of life—but he—or his wife—solaces himself with his white collar.

But independent of the question whether a civilization of mere creature comforts, good plumbing, golf, movies and baseball, will long satisfy an aspiring people—and our own lack of interest in America's future, if it be so—the spectre of over-production will reappear just as certainly as it did in Victorian days when people demanded fewer commodities. Even automobiles and radios have their “saturation point.” Aeroplanes and other unforeseen inventions may indeed prolong that point, as to production in general, beyond the lives of any of us now living. But, as over-production of perishable food begins at once when the hunger of the moment is satisfied—it is a thousand years since the excess supply of fish, for instance, in London markets was, not given to the poor, but destroyed—so, at some point, over-production of machine-made articles will arrive, as we see to-day, in the cotton textiles. We may defer it, temporarily, by “dumping” abroad to keep up the price at home, as was recently proposed to Congress in the bill our President vetoed, even as to food-stuffs, thus taxing everybody else for the farmers' benefit. So, as to manufactures; protective tariffs will postpone the day for a time, destroying the foreign supply at the expense of the consumer at home. But a day will come—as already in England—when we shall produce more of these manufactured commodities than are needed at home, and, owing to prohibitive protection, are no longer with a foreign market. Then “hard times” will recur: meaning, simply, that our civilization, our “*kultur*,” is not truly culture—it is too narrow, too poor, to engage everybody's full activities, even with an eight-hour day and a five-day week. Then we shall again

have our lowered wages, strikes, unemployment—all the crude concomitants and fruitless remedies of a people which, to a higher intelligence, would seem but half-civilized.

For organized Labor's defenses—limited production, shorter hours, exclusion by unions of new workmen—are obviously but palliatives, even of their own condition; and take no account of the starving outsider. That is why the outlook is in our present general ignorance so dark, the cure so difficult. Just as few sick men can regain health by taking medicine, so we cannot get a higher social state by making laws, or even by government action. The nature—æsthetic and intellectual—as well as the character of the American man must be changed. Just as he must learn to abstain from liquor, so he must learn to desire, not so much more, as more kinds of, things—and those “things” will largely be of thought, of beauty, of joy.

For there is no limit to the desire for all that gives the higher *value* to life. Take the simplest example of our meaning; a man having eaten a large beefsteak does not want another; but a picture-lover having one picture does want two.

But our present human nature sets two lions in our path: first, the general prejudice against the “highbrow,” it does not *want* to be elevated; second, the false doctrine of the great laboring masses that in some way their own share of the global product will be greater if they give less value for their wage. For this is only true temporarily, and in such a narrow civilization as the industrial England of the last century. It is axiomatic that, for everybody to be better off, each producer must produce, not less, but more, and more *kinds* of things; for these there must of course be a demand; and we shall not be so fortunate as Henry Ford was, until we more highly educate the people—and by education I do not mean book-learning, but every faculty of world-interest, nature-love, literary, dramatic, musical, æsthetic of any

kind, that can be found or developed in man—not forgetting human character and the love of one's neighbor.

For the ethics of the great body of producers to-day are as crude as war—they rely on trade-unions or trusts. Only a few research or charity workers, doctors, teachers, and a dwindling number of public men devoted solely to their State, town or country (for we were longtime fortunate in having that class in America, rarer in England and quite un-understood on the Continent), lead really selfless lives. Thus we must rebuild, build up, character, as well as our capacity for more and higher joys.

It is true, but it proves nothing, that in the Great War the artists, sculptors, musicians, actors, even authors, were the first who felt the demand for their work fall off. Of course the less material things are first dispensed with. And war itself creates vast new needs—in which only a few camouflage artists and the research chemists were of use. But, if war end, we shall shortly arrive at a time when all things now demanded by the American man will be made with less than our capacity for production, and with fewer of his hours than the average man wishes to work. Then we shall have over-production—of our present needs. Then, unless we have educated ourselves to other, higher, needs, there will be economic disturbance, strikes, riots, revolution—unless, indeed, contrary to all human experience, we progressive Americans are content with the present *status quo* and our surplus powers are given to golf, bridge, baseball, movies. And, the devil still giving idle minds something more to do, we shall endeavor more and more to control one another.

Here we may explain why so much space has been given to the matter of our first part. For joy, the higher and broader life, and finally character itself, cannot exist without liberty. Full and free liberty of development must exist. We have admitted "control" to be often advisable, sometimes necessary;

but a free democracy must very carefully watch her steps in that direction.\*

If Alice were in our wonder-land, she might sum it up by saying that America has taught the world that we may all have a number of things. But America has to remember that there must be more kinds of things, and higher kinds of things, not only for reasons of light, joy, truth,—but for the crass economic reason that elsewhere our old economic bug-bears, over-production and the Marxian law, may return to plague us.

\*Let us contrast the ideas of two Germans, who wrote a hundred years apart: first, Lieber:

"Ancient liberty demanded disregard of individual liberty; modern liberty is founded upon it." (*Political Ethics*, I, p. 161)

"The individual stands incalculably higher than the State; for, that he may be able to be all that he ought to be, the State exists."

"... the other view is expressed by Aristotle, namely that the State exists before the individual ... the State was all, and everything, the individual receiving his value from the State alone." (*Ibid*, p. 173.)

"The Constitution of the United States has no definition of liberty; its framers no more thought of defining it in that instrument than people going to be married would stop to define what is love." (*Ibid*, p. 36)

"... those charters of the whole Anglican race, which belong to the times when governments chartered liberty and to those (ours) when peoples charter governments." (*Ibid*, p. 51.)

Then Keyserling, *Travel Diary of a Philosopher*:

(p. 357) "The desire for freedom is awakened generally before recognition is ripe, before it is aware of what it means, how it is expressed, and this necessarily brings with it temporary coarsening and superficiality. The New World illustrates this with terrifying clarity. . . . The consequence is that life, instead of becoming more self-determined in a wider frame, loses its autonomous nature progressively. In the most modern democracy actions are determined mechanically to a degree which never existed under ancient tyranny there, at any rate, something living took the decision, good or evil; here accident decides, the force of circumstances, life is absolutely dependent on inorganic forces . . . but this experience had to be gone through. Only overpaid recognition is a permanent possession for humanity. Some day or other democracy will have been overcome . . . humanity will have acquired so much knowledge by then that its attitude to the soul will not differ from our attitude to nature. It will countenance psychic facts in exactly the same way as material ones; it will grant the man who inwardly is on a higher level the higher external position as a matter of course, without strife, well aware of the fact that it is just as senseless to decide a man's value by majority vote as to decide the existence of Selenium."

One of the greatest abuses the Declaration of Independence complained of was that of double jeopardy—the trial of Americans in British courts for offences also triable in the colony courts. That we are now again subjected to that danger, see letter of Austin G. Fox to the New York State Legislature, March 12, 1929.

## CHAPTER XIV

### THE TRUE POLITICAL ECONOMY

The true economy for our New-World democracy must be that which studies the general dissemination of things of *value* to man; always remembering that our "man" is not the horrible "economic man," nor even the "average sensual man" as he now is, according to Matthew Arnold in England, or his American counterpart, Babbitt; but man prepared to rise to higher things. And likewise our "things of value" does not mean Mill's "value in exchange"—which is only price—nor even cost, money-cost;\* but the true cost is simply the amount of human life, energy, given to create the thing; while *value*, in Ruskin's language, is the amount of human life or joy the thing is *worth* (*valet*) to the higher humanity; the accession it brings to man's life, health or happiness; and it will be seen that this definition by no means excludes pleasure, if it raises health, or spirits, or makes for a man's content with his lot.

But before following our idea to its more precise realizations, let us, like any good modern American "efficiency engineer," begin by eliminating waste. Just as the balance-sheet of a great railroad may end in red but for what is saved by

\**The Decline of the West*, Oswald Spengler, tr., N. Y., 1928.

"Through money, democracy becomes its own destroyer, after money has destroyed intellect. . . . Men are tired to disgust of money-economy. They hope for some real thing of honour and chivalry, of inward nobility, of unselfishness and duty . . . everything that is intrinsically sound enough to be, in Frederick the Great's words, the servant of the State—Socialism in contrast to Capitalism . . . becomes suddenly the focus of immense life-forces. Caesarism grows on the soil of democracy. . . ."—Spengler, II, p. 464.

It may, in Germany; but the American way may yet prevent it. Yet he is right in condemning money economy; *value* economy must supersede it.

"From Adam Smith to Marx it is nothing but self-analysis of the economic thinking of a single Culture on a particular development-level . . . it starts from Material and its conditions, needs and motives, instead of the Soul."—*Ibid.*, p. 470.



the avoidance of "empties," the reduction of switching charges, or the use of "waste"—or of a mine, or of a packing house but for its by-products,—so we must keep an eye on non-productive labor, unnecessary employment, avoidable salaries, commissions, "rake-off"; and to say *what* is "unnecessary," we must profoundly analyze the meaning of "productive" or non-productive labor or consumption. In hardly anything else—except perhaps in what true value consists of—is American economic thought at present so shallow. This will be seen when we challenge two of the most firmly based business ideas we now hold—advertising, and life-insurance. The former has almost grown to be *the* idea; we are showing *how* to England; the study even of the Harvard School of Business Administration is largely given to it; national prizes are awarded for the most taking "ad"; the scenery of our national highways is blotted out by them. Yet it may be argued, from the point of view of the whole people, that nearly all money spent in advertising is *non-productive*, i. e., wasted; and not merely non-productive, but economically destructive in that, in the long run, it makes a higher price to the consumer. A strictly socialistic government ought probably to forbid display or road or sky advertisement entirely, and limit its legitimate use, for the purpose of necessary information or bringing seller and purchaser together, to some state paper, published and universally disseminated at state expense. For there are obviously only three uses of commercial advertising; if your goods are worse than your competitors, it is a fraud on the consumer; if they are "equally as good," it is, from the consumer's point of view, a waste of money, for which he ultimately pays; only if they are really better, or are a new discovery or invention, is advertising a productive use of time or money, ethically justifiable. And this is despite Emerson's famous epigram that if a man will only make the best mousetrap, the world will beat a way to

his door; for the modern world is too big, too ignorant, too inattentive, too slow, to find it out, at least in the mousetrap man's lifetime. But how many advertisements, costing expensive labor in printing houses, destroying our forests for the woodpulp required in full-page displays, are really of this sort? How many more are not rather like Grenville Murray's story of his first business venture—"I bought a box of matches, added an equal number of pine splinters, dipped the ends of both in red paint, and charged for the product twice as much per match as the good matches originally cost"—and advertised. Are not all of our groceries, drugstores, all retail businesses, full of commodities selling under a registered trademark name, which are only the old stuff, doubly adulterated, but called "refined," or selling under a different name, at twice the cost? For every good bond that you buy of an investment house you have to pay your share of all the advertising circulars sent to those who did not buy, or for the competition of the honest with the "sucker" list.

All this, except from a merely selfish point of view—one trader trying to get the better of another—is a non-productive use of money. More, it is wasteful. To say nothing of the annoyance, the total cost of sending the writer stock and bond circulars last year he estimates at \$624. He bought \$5,000 worth of bonds, on which the banker's profit was perhaps \$125. This \$499 was therefore actual waste. And I read that in an association of dairymen—simplest of food-stuffs—a substantial percentage of their expenses was for advertising!

Leaving its economic side, what we have called "the problem of advertising," in a great democracy, influences the election and administration of its government. We have adverted to the difficulty of getting the best men as well as the best goods before the people. Particularly under a direct-nomination system it requires a vast expenditure of money. A gov-

ernor of Massachusetts was once elected largely because he made a five-dollar shoe which was advertised with his portrait on every fence. The ordinary man will vote for the candidate whom he has heard of before. How, without a vast expenditure of money, persuade a hundred million voters that a country lawyer, one A. Lincoln, is the best man to vote for—at least, during said Lincoln's lifetime!

"Publicity" is now our largest field of expenditure—less than ever, in these broadcasting days, can we avoid it—yet it is, economically speaking, non-productive expenditure.

I have already pointed out how life-insurance is the one great business that ought to be taken over by the State; even the postal service—like the telephone, compare the British with the American!—could be run by private initiative much better than by the government. But not fifty per cent of the premiums now paid goes to the policy-holder at his death, or ever. The odds in favor of the bank are thus far greater than at Monte Carlo! All that fifty per cent goes in salaries or advertising—trying to get the better of a rival company—and the insurance men (one hears the army of them shriek denial) are all non-productive laborers, drones; that is to say, grafters on the earnings of others. For, of course, their business nationalized, advertising and soliciting would be unnecessary; the State would only have to pay for book-keeping and medical examinations, and, furthermore, need keep no reserve—thus, as I earlier said, also removing the frightful danger and abuse of such vast money-power in private hands.

We will content our thesis with these two leading examples. Transportation, we may admit, is generally a productive industry. But we see already that there are still great fields of human labor which the ideal State would transfer to a really productive employment—thereby vastly increasing the share which every man may expect of the good things of life. We are therefore probably nearer than we think to that

day of general plenty where every man will have his house, his garden (I hope), his automobile, his radio; his wife her labor-saving contrivances; all men plenty of food and clothing and leisure; their children a wise education—aye, there will be the rub perhaps—for just then will begin again the menace of over-production—and the schools must teach the children deeply, broadly, to want, to love, to aspire to ever higher things, both for themselves to do, and to understand when done by others.

The other great field of wasted human energy is not mis-employment, but no employment at all. This is indeed familiar; on it the attention of economists, even governments, has long time been concentrated. It exists to-day acutely in England. But we shall not dwell upon it; for we consider it, in the long run, remediable; that is to say, remediable by a broader civilization. The late Charles Eliot Norton thought the Republic could be saved by "Art." He thought confusedly; he was not an economist, and was concerned only with the æsthetic side, its effect on human nature; but there was an economic truth in it too. If the England of to-day had as much and as diverse an appreciation of art and as many artists—i. e., skilled handicraftsmen, as well as artists in the narrower sense—as had the Florence of the Cinque Cento or the Athens of Pericles, there would be no "unemployment" there to-day. But when your civilization is based on coal and iron, and the demand for what coal and iron can make falls off—or other countries learn to work their metals too—you have in those industries, unemployment; and a narrowly educated people cannot rapidly transmute its skill and talent in the worker, nor suddenly develop other tastes in the consumer.

All this, we say, may be improved. But first of all, we must do away with *intentional unemployment*. And here we have lions in our path—the trade unions, the renaissance of the an-

cient abuse of monopoly in trade. It matters comparatively little that by collective bargaining they jack up their wages disproportionately—the legitimate object of trade unions is to raise their own wages—but much that they thus compel idleness in others. In my town, where I pass the summer, for every eight carpenters only one apprentice is allowed. That liberty of trade for which the freeman of England contended for many centuries and acquired completely in the nineteenth, the twentieth is throwing away. Out of political motives, or laziness, or cowardice, we all yield to it. Without going so far as did Norton's cousin, the late President Eliot, as to call the "scab" the modern hero, we at least submit that his motive, to give his family bread, is legitimate, not aggressively selfish, and works for the common weal. Yet I know a certain town in Colorado where the union miners attacked a bunkhouse full of non-union men and murdered several of them, with a few of their wives and children; the murderers who were killed in the conflict have a grand monument in the town cemetery, the murdered men have none. And, though not attended with direct homicide, the methods of our great monopolies like the Standard Oil were, in the pre-Roosevelt days, no less selfish, equally destructive of other men's livelihood, if not of their lives. The price of necessities may be jacked up beyond the poor man's ability to pay. I bought aluminum kitchen-ware in the mediæval-seeming island of Majorca at one-fifth the price I have to pay in Boston!

This therefore is another great change democracy must learn to make—a change in its own character. Unto this *first*. Before we seek by education or other ways to broaden our culture, elevate the general human nature—our artisans and our laborers, our employers and our trade unions, even our "trusts"—must come back to the Golden Rule. Economically, also, this is necessary, to avoid unemployment, to bring about that social paradise where all may have a competency—

a *competency*, excellent word to describe what we mean, signifying competent for all reasonable (not excess, nor luxury) demands of the highest possible human life. And here many of us will, like the young man in Scripture, "go away sadly." Like the doing away with war, it is, he will say, not possible. But even Nicodemus came back. . . .

We shall insist that nothing is impossible, to men who are free.

Firstly, therefore, let all labor, trade, and thought be free.

Secondly, do, by aggressive selfishness, no harm to others, still less, by union or by statute, seek to control their activities or to deprive them of their liberties.\*

Finally, teach—in the common schools if possible—*what* things or enjoyments are of value—that is, giving out life, not death.

Perhaps above all in our educational system, give more thought to the highest. You have done little when you educate the masses up to the point of reading tabloids and going to the movies but create a most dangerous proletariat—only the more dangerous in that they vote. Remember that a civilization is gauged, human progress is made, not by the mass but by the top few. It is the top ripple that leaves the highest mark upon the shore; later, tide by tide, the ocean follows. This mostly we are neglecting; in our thought, our colleges, especially in the vocational Western universities. De Tocqueville predicted it; but for the latest statement of this truth let us invoke the cynical materialist, leader of the nation still the most enlightened,—Clemenceau.

"On a cru fort longtemps que l'instruction profusément répandue allait faire évoluer l'homme d'une façon presque

\*"The nature of democratic power," said de Tocqueville, "is not to be fierce and cruel, but minute and meddling. Despotism of this kind, though it does not trample on humanity, is directly opposed to the genius of commerce and the pursuits of industry." And he might have added, to broad culture and the higher civilization. "Give democratic nations education and freedom," he added, "and leave them alone."

instantanée, comme il se faisait dramatiquement autrefois par le coup de théâtre des conversions religieuses. Le résultat n'a pas correspondu aux espérances. . . . 'Nous n'avons plus d'élèves—tout le monde veut gagner de l'argent.' ”\* Elsewhere—great democrat that he is—he devotes many pages to the statement that humanity progresses only by the highest education of the greatest minds. For this idea is not inconsistent with democracy; but democracy must learn to realize that it is not.

\**Au Soir de la Pensée*, vol. I., p. iii.

## CHAPTER XV

### MANNERS AND CUSTOMS

"Manners makyth men"; and in this word we include modes of action, common taste, general way of life, as well as mere personal demeanor. These cannot be affected by legislation; indeed, it is *out* of custom that legislation should grow, not the other way about; often bad manners lie at the root of our frequent failure in international policy. And the principle of equality—for which, of all the generalities of our Constitution, our people care the most—tends, unfortunately, to do away with manners, and, by too uniform custom, to bring about a drab civilization. Here our prophet's prediction was curiously wrong. "For several ages social conditions have tended to equality, and we discover that in the course of the same period the manners of society have been softened. . . . Equality of conditions and growing civility in manners are then, in my eyes, not only contemporaneous occurrences but correlative facts." Not, alas, with us. Greater humanity indeed prevails—he points out with horror how even so gentle a person as Madame de Sevigné writes of oppressions of the poor and slaughterings in the streets—but not gentler manners. And as to customs, the great peril of equality is mass control.

And when we come to the greatest of all domains controlled by custom—sexual and marital and parental relations—he has proved ludicrously wrong "I have shown how democracy destroys or modifies the different inequalities which originate in society: but is this all? or does it not ultimately affect that great inequality of man and woman which has seemed, up to the present day, to be eternally in human na-



ture? . . . There are people in Europe, who, confounding together the different characteristics of the sexes, would make of man and woman beings not only equal but alike. They would give to both the same functions, impose on both the same duties, and grant to both the same rights: they would mix them in all things—their occupations, their pleasures, their business. It may readily be conceived, that by thus attempting to make one sex equal to the other, both are degraded; and from so preposterous a medley of the works of nature, nothing could ever result but weak men and disorderly women. It is not thus that Americans understand that species of democratic equality which may be established between the sexes. They admit that, as nature has appointed such wide differences between the physical and moral constitutions of men and women, her manifest design was to give a distinct employment to their various faculties; and they hold that improvement does not consist in making beings so dissimilar to do pretty nearly the same things, but in getting each of them to fulfil their respective tasks in the best possible manner. The Americans have applied to the sexes the great principle of political economy which governs the manufactures of our age, by carefully dividing the duties of man from those of woman, in order that the great work of society may be the better carried on. In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes and to make them keep pace one with the other, but in two pathways which are always different. American women never manage the outward concerns of the family, or conduct a business, or take a part in political life; nor are they, on the other hand, ever compelled to perform the rough labor of the fields, or to make any of those laborious exertions which demand the exercise of physical strength. If on the one hand an American woman cannot escape from the quiet circle of domestic employments, on the other hand she is never forced

to go beyond it. Hence it is that the women of America, who often exhibit a masculine strength of understanding and a manly energy, generally preserve great delicacy of personal appearance and always retain the manner of women, although they sometimes show that they have the minds and hearts of men. Nor have the Americans ever supposed that one consequence of democratic principles is the subversion of marital power, or the confusion of the natural authorities in families. They hold that every association must have a head in order to accomplish its object, and that the natural head of the conjugal association is man. They do not, therefore, deny him the right of directing his partner; and they maintain, that in the smaller association of husband and wife, as well as in the great social community, the object of democracy is to regulate and legalize the powers which are necessary, not to subvert all power. This opinion is not peculiar to one sex and contested by the other; the women of America do not consider conjugal authority as a usurpation of their rights—such is at least the feeling expressed by the most virtuous of their sex; the others are silent, and in the United States it is not the practice for a guilty wife to clamour for the rights of women, while she is trampling on her holiest duties.”

This extract needs no comment. We have certainly progressed a long way since then. Nor is the change peculiar to our democracy. Germany, England, Scandinavia, have followed suit. Of progressive countries, only France remains conservative; and that only as to political action. We may conclude therefore that something like voluntary divorce will soon be reached, though yet, illogically, some of our States treat adultery as a crime, and we are far on our way toward that unification of function which the French observer thought we were particularly without. And, as we saw in our first part, the State is more and more interfering with the parental relation.

The only brake must be religion. Every lawyer knows that the present situation is impossible. The law pretends to deny divorce for collusion; yet ninety-nine per cent of our American divorces are voluntary on both sides, and ninety per cent are secured for the purpose of what the Roman Catholic Church at least would call committing adultery. And why should there not be two standards—a secular and a religious one? The State is really only concerned with good order, determination of paternity, and the proper bringing up of children. And it is important to bear in mind the distinction between sin and crime. Adultery, even divorce for the sake of making a new marriage, may be sins; they are certainly not crimes. Leave out of church sanction those who would shape their lives according to this State standard only, granting them what they now get—divorce at will of both parties, or for the offence of one—but let the Protestant churches return to the attitude of the Catholic—let not the church set its seal upon a “remarriage,” which is but a cloak for adultery. The present star-chamber proceeding by which the Episcopal church at least undertakes to go behind the courts of the land, leads to endless abuses. Yet when the writer urged this line, thirty years ago, before a convocation of bishops, he was met by two objections—first that most people, all of the so-called “upper classes,” still want a wedding in church; second, that the churches themselves, certainly the evangelical ones, fear to lose a vast proportion of their contributing communicants, and would rather seek to adapt themselves to Cæsar—that is to say, to the State secular law, however lax it grow. And all radical, socialistic elements, in all countries, would do away with marriage entirely.

Here therefore we may leave this subject. The views of the State, of the Protestant churches among themselves, and of the older church, Roman or Anglican, are what the

French call *disparate*. There is no reconciling them; they will not dove-tail into any system.

As manners depend mostly on the place we allow to women in our lives, and de Tocqueville has that so well expressed, this chapter is short. And as for customs, we refer back to our chapter on true value. "But if numbers insist on equality, if the wage-earning classes attempt to destroy all eminences and inequalities of rank and wealth and influence, if they fail to see that it is desirable that a few should have what all cannot possibly have, and that civilization, which is, what the Frenchman called it, *le goût du superflu*, is not compatible with absolute economic equality, then the system of pure democracy will fail and disappear, either before or after destroying the civilization which alone made its experiment possible."\*

But we may conclude this chapter by remarking the curious fact that the anticipations of personal liberty, release from State tyranny, that were the dream of modern democracy in the times of Jefferson and the French Revolution, have only been realized by the women—their personal liberty, *their* freedom to contract, *their* release from restraint in even marital relations. All other matters, even to the birth and rearing of their children, the State seeks to control.

Is it, with us, to be explained by that unprecedented reverence for our women we Americans have always shown? Anyhow, the Frenchman shared it; for he concludes *his* chapter by saying:

"I have nowhere seen women occupying a loftier position; and if I were asked . . . to what the singular prosperity and growing strength of that people [the Americans] ought mainly to be attributed, I should reply—to the superiority of their women."

\*Burke, paraphrased in London *Times* Literary Supplement for Jan. 10, 1929.

## CHAPTER XVI

### EXTERNAL RELATIONS

There is no doubt of the present world-desire for peace, nor of the fact that democracies make for peace. The only exceptions are of those countries which are neither modern nor in any real sense democracies—the Balkan countries, Italy. Two South American republics “renounced war” two decades before Mr. Kellogg discovered\* the phrase. The Orient was always peaceful, internationally speaking, until the Occident taught it how to fight. All war, in the Christian era, has been either religious, or for conquest, territorial aggrandizement, or, in the last two centuries, economic advantage. With the downfall of Germany, the satisfaction of Britain, the parcelling of the black and yellow world into “mandates,” we may hope that the first sort of war, under the word of Wilson, his article Ten of the Covenant, the spirit of Locarno and of the great American peoples, has indeed disappeared for all time. Religious wars too have disappeared, with a more Christian understanding, albeit with some slackening of belief. Revolutions are of course not over, while any vestige of the old order remains. Otherwise wars will in the future be for economic reasons, raw materials, or the exploitation of less advanced peoples by trade, the control of their mines and public utilities. For these reasons, all Asia is still a “*champ de Mars*”; and Africa too, so far as the mandates are not observed; the weak Latin-Amer-

\*Both our press and public welcomed the idea and the phrase as if new to the world. But on the 22nd of May, 1790, the French Constituent Assembly voted a motion which to be made perpetual became Title IV of the French Constitution:

“La nation française *renonce* à entreprendre aucune guerre dans la vue de faire des conquêtes” (Louis Madelin, *Les Hommes de la Révolution*, p. 117).

There followed twenty-five years of warfare.

ican countries still fear it from us, not directly, avowedly, but as a consequence of "dollar diplomacy," economic penetration. For the Drago doctrine, a thing of recent years, South American, was the first definitely to pronounce that a lending country may not send its marines after its millions.

Nevertheless, we are looking far ahead; it may be, for centuries; it may also be that we must first do away with all custom houses, get a mutually comprehensible language, drop the cheaper fustians of patriotism, "hundred per-cent Americanism," and approach even the dreaded condition of internationalism, hated now by all but our socialists. Who can tell! But the time will come—and only democracy, with much of Christianity, can bring it—when the whole world will gladly allow each man, every people, to do what it respectively can do best, even seeing, perhaps, that this is, in the end, to its own higher advantage. (For Christianity is, after all, the only selfless religion of *action*; it has *commandments*, not *forbidments*; Judaism is racially selfish, Mahometanism aggressively more so; while the dreamy Eastern faiths, however much they approach the Christian ideals, do so only passively. They are negative, home-bound, so that their aim seems to us rather death than life. And I doubt if many of us, professing Christians or not, seriously believe that any Comtist humanitarianism can bid the whole of humanity sacrifice self to higher things; in its teaching lies rather Nietzsche and the Prussian gospel of *Kultur*.)

And that is just where our American democracy is most pre-eminent. Many books have been written about us, particularly of late years—not perhaps so much out of admiration as envy—but no foreigner has pointed out—none has perhaps seen?—the extraordinary altruism of our people, despite our rejection of the League of Nations; it is already overflowing national boundaries, extending to all peoples of the world, in a way that, in England, only the al-

truism of the very few—the prophets, the Wilberforces, the Shaftesburys—did, and in other countries hardly any, as yet. Spain might have come nearest, but the immortal mould of Don Quixote was broken on the cross—of gold, a true metaphor this time; not the Cross that Columbus carried. No higher—no so high—ideal ever moved a great nation than is found recorded and ordained in the provincial archives of Madrid. It puts all our legislation for the Indians to shame; forbids slavery two hundred years in advance of Cotton Mather; is no narrower than his theology, and far kindlier; in the true sense *catholic*, withal. What ended it? The Inquisition, and the thirst for gold.

Then it was England's turn to lead humanity in charity. And now our democracy takes up the torch. It is amazing how generally we feel it. It strikes surprise among the English, dumb wonder among the French. Not a great fortune is made but is spent, albeit clumsily or mistakenly, for what the owner deems at least to be the general, and in these later years when fortunes are vaster, even world, welfare. Very few of our millionaires at home remain in what one may term the steam-yacht stage! and these are chiefly women whose husbands are of the foreign nobility, or men who ape their customs.

And we do not hate one another. A foreign-born woman, of extraordinary penetration, ascribed even our lack of manners to this. Europe is still a world of *class*; but if we have class hatred at all, it has its beginning in the narrower views, already adverted to, of the labor union. Continental families have the supreme desire, transcending even the happiness of their children, of maintaining their rank, climbing in social position. "Underneath, we really envy, antagonize, one another"—said this lady to the writer—"that is why our surface manners are so ingratiating." Nothing of this kind yet exists in America; and I see no reason why in a democracy

it ever should. It is true that our nerves are strained, our faces are lined, with the effort to make enough, more than enough, money for the family support; but it is not gained by marrying off one's daughters, nor by court intrigue. Hard as are our business methods, relentless as is our competition, it all involves no more personal animosity than a game of golf.

And this general American kindliness we are now beginning to make international. As I write these lines our Secretary of State is signing that general New Year's resolution to give up war; fourteen countries, most of them formerly autocracies, following the lead of the two greatest democracies. War will not be impossible while armaments and tariffs last; but it is the first *world* State-paper which tells the world that the way of democracy is peace. France, in the Resolution quoted above or through Henry IV with his Grand Idea, spoke for France alone.

And this condition, we shall assume, in our remaining study, to have arrived. War may not go this century; the jealousies, misappreciations, which lead to war, not for several more; but as surely as we enlighten the world, the Western world, including ourselves—the oriental world did not need the lesson of peace until we brought them war—Peace will be democracy's way.\*

Now to bring that condition about, we must learn, first of all, to be catholic; to understand, to appreciate, all that other races or countries do; to enjoy their art, welcome their literature, profit by their ideas, mix—in our American slang sense—not, possibly, by miscegenation—with their

\*Yet we must not be too hopeful of the apparently universal desire for peace. The same phenomenon existed after the Napoleonic wars. "The dread of war displayed by the nations of Europe," says de Tocqueville, in 1838, "is not solely attributable to the progress made by the principle of equality among them; independently of this permanent cause . . . I may mention before all the rest the extreme lassitude which the wars of the Revolution and the Empire have left behind them."<sup>2</sup>



people. And here we Puritan, Calvinistic, "Nordic" people are possibly farther behind than the artistic, emotional Slav or the adaptable Chinaman! Our Baptists and Methodists are seeking to stop all this; to control our culture to their views—so again our thinking leads back to the broad highway of liberty; again we question, while admitting, unlimited "control." Is our civilization to be one of censoriousness? We are already—even de Tocqueville saw—far too ready to interfere with the individual. Thus, while cheap newspapers, the movie, tend to lower our culture, bureaucracy seeks to limit it at the top.

"Because the civilization of ancient Rome perished in consequence of the invasion of the Barbarians, we are perhaps too apt to think that civilization cannot perish in any other manner."\* Our culture shows ominous symptoms of dying at the top. Feeding at the roots is not enough; we must tend carefully the topmost bud, where the flower is. True: "the world has more need of the flower than the flower has of life";† but, if the flower is left to die, whence shall come the seed?

Again, from the same page, we may quote our prophet: "possessing education and freedom, men living in democratic ages cannot fail to improve the industrial part of science . . . henceforward all the efforts of the constituted authorities ought to be directed to support the highest branches of learning, and to foster the nobler passion for science itself." And how much truer of the highest science, that of man himself—"the humanities," we will call it, but not in the narrow classical sense. "When Europeans first arrived in China, three hundred years ago, they found that almost all the arts had reached a certain degree of perfection there; and they were surprised that a people which had attained this

\*De Tocqueville, *Democracy in America*, vol. II, p. 47.

†O. W. Holmes, Jr.

point, should not have gone beyond it. At a later period they discovered some traces of the higher branches of science which were lost. The nation was absorbed in productive industry . . . but science itself no longer existed there. This served to explain the strangely motionless state in which they found the minds of this people.”\* Yet, “China had subsisted peaceably for centuries . . . order prevailed there, a sort of physical prosperity was everywhere discernible; revolutions were rare, and war was, so to speak, unknown.”

Like our mark at the glacier’s side, this century-old observation is most illuminating. Peace alone is not enough; even, in the long run, to preserve from war; look at China now! There must be life—and light! Will a civilization of contrivances give this? Will it not, even, end—by boring us! Intolerable ennui of life may drive to revolt—the coolie was soothed by opium, the Western laborer by alcohol, and now, both forbidden, some, I fear, take to sexual adventure, or to crime! And more dangerously, because now sober!

We of the twentieth century consider both science, pure science, and letters necessary to civilization; perhaps we have now too much of a tendency to despise the latter; but if the former lead to what we have called a civilization of contrivances, the latter may lead to China. Yet it is possible to conceive of a very high and happy State without machinery or chemistry, nor merely rustic, Arcadian; all that made Greece great might still exist. Certainly the modern trend to sharp differentiation, “bifurcation,” as the national educational system compelled in France and now practised in most of our State universities, is to be condemned. I will quote but two ultra-modern writers on this point—Anatole France and Rudyard Kipling—and de Tocqueville again. Him first: “No literature places these fine qualities [pro-

\**Democracy in America*, vol. II, pp. 47, 48.

fundity, clarity, beauty], in which the writers of democracies are naturally deficient, in bolder relief than that of the ancients: no literature, therefore, ought to be more studied in democratic ages." And France:

"At that time the pupils of the University of France when they left the grammar schools were required, when on the very threshold of the higher instruction, to choose at once for either the Letters or the Sciences—at the age of fourteen or fifteen they had, as we put it, to 'bifurcate'—according to the best lights of themselves or their parents—along one or the other branch of the tree of knowledge.

"While not unduly moved by the obligation so to choose between Eloquence and Algebra, and no longer to follow the entire band of the Muses, our minds suffered none the less a serious damage; . . .

"For the Sciences, separated from the Letters, remain mechanical and material [*machinales et brutes*], and Letters, deprived of the Sciences, are hollow, for Science is the subject of Letters."\* And Kipling, in an address:

"Our ancestors were not fools. They knew what we, I think, are in danger of forgetting—that the whole background of life, in law, in civil administration, in conduct of life, the terms of justice, the terms of science, the value of government, are the everlasting ramparts of Rome and Greece—the father and mother of Civilisation. And for that reason, before they turned a man into life at large, they arranged that he should not merely pick up but absorb into his system (through his hide if necessary) the fact that Greece and Rome were there."

We moderns live in a time of "many inventions"; but we cannot too often remind ourselves that all these inventions or contrivances have of themselves added to life no new joy, no new faith. Music, speech, pictures have been broadcast;

\**La Vie en Fleur*, p. 76.

and man himself moves more rapidly about his narrowing world. Not a new sense, not a new taste, has been added; nor, metaphysically, anything to our knowledge. Without any of them, health, art, beauty and the love and creation of it, literature, music, painting, sculpture, agriculture, even sport—all that we think raises man above the animal, might exist even in greater perfection than now. Man's last great cultural invention was that of the alphabet. We have done nothing since but invent contrivances for reproduction and cheapening, as with the printing press, and, more questionably, the metal plate or lithograph. Scientific and physical knowledge we have indeed vastly increased; historical also—man has become conscious of his past—and it has led many of us, materially, to determinism, and spiritually, to deny our future.

Not that we do not now begin to see a glimmering of light at the end of the well where truth lies buried. Not—far from it—that we would deny the value of knowledge. We are tending to our conclusion that the final cosmic cause—call it God or but an enchainment of processes—is not death, but life, light, joy; and knowledge is surely light, just as there was meant to be joy, in life. For even joy is a *value*—there the Puritans failed—yes, even subjective joy, thus we justify the pleasure in music, sport, the love of nature, the enjoyment of art—but how far greater a value when the pleasure is altruistic, the joy for others also, such as the healer of the body feels, or the teacher who inspires the soul of man. For the soul—the mind, if the other word offend the Bolshevik—still transcends. Was it determinism that moved the mind of Shakespeare and the life of Francis of Assisi?

Clemenceau, in his two tragic and tremendous tomes would seem still to think so. Why, then, did he care for France? His life was spent in fighting beasts of Ephesus.

Yet his soul—he must forgive the word, one has no other—was full of poetry all the time.

It is the higher learning that must teach us this. Vocational instruction stops short. And when that is measurably universal, and when democracy has wrought its world of peace, when each nation has learned to understand its neighbor, even the scientist and the statesman may learn to add another word to "life, light, joy,"—these three I hold to be the true cosmic fates rather than the Atropos, Clotho, Lachesis of the Greeks or the Erda of the Goths—a word which is foreign to science, and which even Shakespeare did not know; dimly perceived only by poets, the first seers (perhaps after all the only true *savants*), by Dante in his third book, not the first; by Cervantes as an old man's fantasy; and clearly, so far, by only One in history.

## CHAPTER XVII

### INTERNAL RELATIONS

With all their faults, democracies, and of them our United States, are the nearest to this vision. This, I think, is because they are free; but they must remain so. For, "the nature of despotic power in democratic ages is not to be fierce or cruel, but minute and meddling." The people, "the better to look after what they call their business, neglect their chief business, which is to remain their own masters." Material equality, or at least a minimum of comfort, is democracy's aim; but this should not extend to the intellect, taste, desires, or mode of life—lest it be "too invariably fixed in the same institutions, the same prejudices, the same manners, so that man will be stopped and circumscribed, that the mind will swing backward and forward forever, without begetting fresh ideas; that man will waste his strength in bootless and solitary trifling; and, though in continual motion, that humanity will cease to advance."\*

To maintain this freedom, what form should the government of a democracy assume? Not the least strikingly verified of de Tocqueville's predictions is "that centralization will be the natural form of government; individual independence and local liberties will ever be the product of artificial contrivance." (We would rather say, of fortunate survival.) "The principle of equality suggests to men the notion of a sole, uniform, and strong government, which worships uniformity. . . . Democratic nations often hate those in whose hands the central power is vested; but they *always* love that power *itself*."†

\**Democracy in America*, vol. II, p. 279. To find a great philosopher expressing your exact thought a hundred years before, though depriving it of originality, lends some assurance that it may be correct!

†*Ibid.*, p. 315.

So central power insists on uniformity, and uniformity surely leads to "standardization"—that condition which at last—or for the moment—all but our efficiency experts have begun to dread. Yet our prophet adds: "Among the public men of democracies"—and we should now add, among all women—"there are hardly any but . . . of great disinterestedness"—we should add, of great vision—"or extreme mediocrity [of condition, he means, that is, without political power] who seek to oppose the centralization of government: the former are scarce, the latter powerless." Yet (and here we must transcribe a whole paragraph):

"The English who emigrated three hundred years ago to found a democratic commonwealth on the shores of the New World had all learned to take a part in public affairs in their mother country; they were conversant with trial by jury; they were accustomed to liberty of speech and of the press—to personal freedom, to the notion of rights and to the practice of asserting them. They carried with them to America free institutions and manly customs, and these institutions preserved them against the encroachments of the state. Thus among the Americans it is freedom which is old—equality is of comparatively modern date. The reverse is occurring in Europe. . . ."

But with our new voters—women as well as foreigners, both classes untrained to freedom, uninstructed in the history of human liberty, how long will this last?

"If in all times education enables men to defend their independence, this is most especially true in democratic ages. . . . The concentration of power and the subjection of individuals will increase among democratic nations in the same proportion as their ignorance."†

So to an old truth, but by a new road, we are led to the supreme necessity of a high education, for a free democracy.

"However rude a democratic people may be, the central power which rules it is never completely devoid of cultivation . . . this

\**Ibid.*, p. 317.

†*Ibid.*, pp. 319, 320.

completes the easy concentration of all power in its hands: the administrative function of the state is perpetually extended, because the state alone is competent to administer the affairs of the country." (*Ibid.*)

He adds later on, that "extreme centralization of government ultimately enervates society"—we will go farther, and say that by standardization, and destruction of individual initiative, it ossifies it, arrests all human progress, destroys character,—and that "a strongly centralized government tends necessarily to draw even the courts and the administration of justice under its control"; and he adds a striking foot-note on the "strange sophism," in France, of administrative law. "When a suit arises between the government and a private person, it is not to be tried before an ordinary judge" . . . so they "invest the government with the office of judging and administering at the same time."\* With our Boards and Commissions, we have since travelled far on that road. But in 1840 it was still true that the English-speaking people suffered no "administrative law," nor arbitrary tribunals without appeal. Yet we now have professors of administrative law in our universities.†

But how reconcile national necessities with these fine principles? Roosevelt taught us to "think nationally." How control the Mississippi—see to it that there is education—that the negroes are not oppressed—without a centralized govern-

\**Ibid.*, p. 329.

†So in European democracies. "New and more dependent courts are everywhere springing up by the side of the old ones, for the express purpose of deciding, by an extraordinary jurisdiction, such litigated matters as may arise between the government and private persons. . . . The number of these special courts is continually increasing and their functions likewise increase. Thus the government is more and more absolved from the necessity of subjecting its policies and its rights to the sanction of another power. As judges cannot be dispensed with, at least the State is to select them, and always to hold them under its control, so that, between the government and private individuals, they place the effigy of justice rather than justice itself . . . deciding on them all without restriction and without appeal." *Ibid.*, p. 328.

It would seem that the French prophet foresaw our Interstate Commerce Commission, Federal Trade Board, etc., fifty years before their creation!



ment? And no one disputes the necessity of an Interstate Commerce Commission, though some do not approve of their power to *fix* rates. "You must play with your head," the golf caddy said; and here too a head is necessary. No precise rule can be laid down. France is strongly centralized, perhaps without much harm; though even in that small and homogeneous republic a cry of the religious Alsatians against the secular State is threatening secession. The problem is most peculiar to our own vast republic, not to the loosely United States of Brazil, nor to definitely "unitarian" Argentina; though not without dangerous manifestations in the Dominion of Canada. We can only say, Federal (of the central power) interference should only be resorted to or suffered in a case where it alone is adequate—as a "major" surgical operation—and the patient should be released to home and the family doctor as soon as is possible. As this matter is peculiar to our American democracy, we may leave it here; only remarking that, as no other modern republics have this advantage, the accidental result of our national history, we should think long and carefully before we abandon a scheme of government which besides assuring local liberties and self-government, gives the ship of State the added security of a vessel with water-tight compartments. Experiments may be tried in each one without injury to the whole; though one State adventure socialism, or any other radical experiment, its failure will not cause the whole ship to founder.

It is probably impossible to adopt the federated system in other democracies. Autonomous States are born, not artificially created; they have to have a long past history, a background of traditional liberties; already we note that our new Western states, artificially created, with merely geometrical boundaries, do not have the feeling of "States' Rights"—of local institutions and liberties rigorously preserved.

"States' Rights," local self-government, or "self-determination," is commonly spoken of as an American political institution, or at least one wherein we have enormously extended our English model.\* But it was fully appreciated, and the dangers of abandoning it perceived, by de Tocqueville a hundred years ago. He entitles the second chapter of his fourth and last book, "That the Notions of Democratic Nations on Government are naturally favourable to the Concentration of Power," and says:

"In politics, as well as in philosophy and in religion, the intellect of democratic nations is peculiarly open to simple and general notions. Complicated systems are repugnant to it, and its favourite conception is that of a great nation composed of citizens all resembling the same pattern, and all governed by a single power. [And] the very next notion to that of a sole and central power which presents itself to the minds of men in the ages of equality is the notion of uniformity of legislation. . . . As the conditions of men become equal among a people, individuals seem of less importance, and society of greater dimensions; or rather, every

\*"Uniformity in local laws and domestic institutions of all the States," said Douglas, "was neither possible nor desirable. The founders of the nation knew that what would suit one section would not do for another, and so they provided that each State should be sovereign over its domestic affairs and the general government exercise only powers which were general and national. That was the fundamental principle of our complex State and Federal system . . . in politics, in religion, in industry, in all the activities and conduct of life, uniformity is the parent of despotism the world over . . . merging the rights and sovereignty of the States in one consolidated empire and vesting Congress with plenary power to make all the police regulations, domestic and social laws uniform throughout the limits of the republic . . . variety in local regulations and domestic institutions was vital to liberty."—Quoted in Beveridge, *Life of Lincoln*, vol. II, pp. 594-5.

"The law of liberty is unto the more abundant life—this elemental purpose to awaken and to cherish the largest individual freedom is best affirmed by a distributive government. Such ours now is. In world-wide relations the nation is fitly an integer. For inner administration, the bulk of what comes nearest home, the State is an integer, the county, the village. At last each person (himself a little world) is the unit." (Dr. M. W. Stryker, Dec. 13, 1910, in joint debate with Hon. Frank B. Kellogg, Dr. A. B. Hart, and the author, on the question whether further concentration of power in the Federal government is desirable.—*Year Book* of the Economic Club of New York, 1910-11.)

citizen being assimilated to all the rest, is lost in the crowd, and nothing stands conspicuous but the great and imposing image of the people at large. This naturally gives the men of democratic periods a lofty opinion of the privileges of society, and a very humble notion of the rights of individuals; they are ready to admit that the interests of the former are everything, and those of the latter nothing."

"In France"—the country he deems most advanced in the doctrine of equality—"these opinions have got complete hold of the public mind. Most of our parties censure the conduct of government, but they all hold that the government ought perpetually to act and interfere in everything that is done. . . . The unity, the ubiquity, the omnipotence of the supreme power, and the uniformity of its rules, constitute the principal characteristics of all the political systems which have been put forward in our age" (vol. II, pp. 309, 310).\*

One half our Constitution in bulk, and more than a half in importance, was written to protect private rights. "But it happens that at the same period and among the same nations in which men conceive a natural contempt for the rights of private persons, the rights of society at large are naturally extended and consolidated: in other words, men become less attached to private rights at the very time at which it would be most necessary to retain and defend what little remains of them . . . in the present democratic ages the true friends of the liberty and the greatness of man ought to be on the alert to prevent the power of government from

\*De Tocqueville here prints this foot-note (*Ibid.*, p. 312):

"Men connect the greatness of their idea of unity with means, God with ends; hence this idea of greatness, as men conceive it, leads us into infinite littleness. To compel all men to follow the same course toward the same object is a human notion; to introduce infinite variety of action, but so combined that all these acts lead by a multitude of different courses to the accomplishment of one grand design, is a conception of the Deity.

"The human idea of unity is almost always barren; the divine idea pregnant with abundant results. Men think they manifest their greatness by simplifying the means they use; but it is the purpose of God which is simple—his means are infinitely varied."

lightly sacrificing the private rights of individuals to the general execution of its designs. At such times no citizen is so obscure that it is not very dangerous to allow him to be oppressed—no private rights are so unimportant that they can be surrendered with impunity to the caprices of a government.” And private rights are in peculiar danger of being forgotten in democratic ages; if an individual be thus oppressed at a time when the human mind itself is impressed with the importance and sanctity of such rights—John Hampden’s, for instance, or John Adams’s—“the injury done is confined to the individual whose right is infringed; but to violate such a right at the present day is deeply to corrupt the manners of the nation and to put the whole community in jeopardy, because the very notion of this kind of right constantly tends among us to be impaired and lost.”

The phrase, *private rights*, is but an enlargement or specification of *Liberty* as we have defined it at the beginning and again we need hardly apologize for substituting the great Frenchman’s lucid exposition for our own.\*

\*More than de Tocqueville, Lieber feared centralization:

“Anglican self-government requires that every institution of local self-government shall have the right to pass such laws [*by-laws*, in the original, but Lieber appends a long note to show that the word *by* means merely *local*, as at the end of a place-name, Derby, Whitby, etc., not *minor* or additional, as the word is now used] without obtaining the consent of any superior power . . . inherent in the local community—a natural right of freemen”; and he quotes Coke. “Of more force is the agreement of the folk and the people than the grant of the king . . . unless such by-law abridge the general liberty of the people, their inherent birthright, assured to all by the common law of the whole land, and which that common law, in its jealous regard for liberty, does not allow to be abrogated or lessened even by their own consent—much less, therefore by the consent of their delegates in parliament.” *Civil Liberty*, p. 323.

“Ancient liberty demanded disregard of individual liberty; modern liberty is founded upon it.” *Ibid.*, p. 360

“What is called a majority in uninstitutional countries, which struggle nevertheless for liberty, is generally a minority, and often even a small minority.” *Ibid.*, p. 324.

“Probably it was this fact . . . which caused Mr. Proudhon, the socialist, to utter the remarkable sentence that ‘no one is less democratic than the people.’” *Ibid.*, p. 369.

“The socialists do not differ from the imperialists; on the contrary, society

is with them a unit in which the individual is lost sight of, even in marriage and property."<sup>2</sup>

"Rousseau insists upon an inarticulated, unorganized, uninstitutional majority. No one can understand the history of France who does not remember the ardor for uninstitutional unity of power [which] must do and provide for everything."<sup>2</sup> *Ibid.*, p. 372.

## CHAPTER XVIII

### SOCIAL QUESTIONS

At this time of writing, our American democracy is principally concerned with the so-called "agricultural problem." The word "problem" is in itself objectionable, as begging the question that there is a problem at all. Any class that is dissatisfied, any trade that demands a larger share of the return, grandiloquizes its position by calling the thing a "problem." Usually it is only a condition, oftentimes a necessary state. The agrarian question—this word is better—has beset humanity from the time that individual land-ownership began. To the Russian moujik it appeared in its earliest and simplest form—he had only to take the land, and is, probably, for a long time satisfied, his life demand being limited to a mere subsistence. But we Americans, seeing the unprecedented reward our skilled labor receives in cities and in mills, are naturally discontented when the apparent return of the farmer is not so much in money wage; and the attraction, the independence, the sanity, of country life, we do not consider. There may be a doubt whether he will ever receive so much, in money, as the city artisan, as the unionized mechanic. It may even be that farming may come to be regarded as a pleasure, the laudable diversion of the rich, as all original necessary food-seeking activities have become—hunting, fishing, sailing. The yachtsman of to-day but duplicates the life of his Yankee ancestor with his coasting schooner, and that without object; the "gentleman-farmer" has something to show for his sport and may feel the added satisfaction of reducing the general cost of living.

But dropping this fantasy, we must grant that the food

farmer is entitled to an equivalent reward with other producers of wealth. And despite the very suggestions we have earlier discussed, of the phrase "*equi-valent*," we must measurably admit that that reward must be equal in money; for other things he will refuse to consider.

At the time of our first writing, forty years ago, the "problem"—that is to say, the discontent,—was mainly with skilled labor. They first became "class-conscious," and they discovered the trade union. Partly as a result of this, but more by reason of that immense creative invention arising from free trade and general elementary education throughout the greatest republic of history, conjoined with our vast natural resources, their reward has been raised to a scale of living on which the rest of the world looks with envious amazement. But then their labor has become skilled above the rest of the world. And they have learned to become capitalists. While doubtless still striving for a greater proportional share of their output, they have learned that greater wages must in the end come, not from restricting or diminishing it, but from increasing it; not from strikes, but from cooperation. And we have shown that we have but to universalize this idea—namely, that all trades must pull together to enlarge, not limit, their output, without regard to any temporary diminution in profit,—to go far to the realization of that economic millennium of which we dream; when all men shall have subsistence, and beyond it a surplus of wage, or a share in profits, and a leisure above their daily toil.

Strikes are disappearing with our higher intelligence; boycotts, restrictions of trade by trade-unions, should go also; the common law, wiser than our statutes, foresaw this; but our lawyers, even our judges, were not versed in the history of the common law; and "precedent" is anathema to the uneducated radical. But farmers cannot strike, nor by any trade union exclude competitors. And land can—or could—be ob-

tained by any one. And their labor, after all, is essentially unskilled. No tariff can aid them while we produce foodstuffs more than our own needs; for the selling price of the surplus, determined by the world-market, determines necessarily the price for home consumption also—in the absence of arbitrary government-interference, which the American people will not in the long run tolerate; impatiently they stood it in the War, when it benefited the consumer, and he is, after all, more numerous than the producer. It would be strange indeed if, by tariff or engrossment, forced marketing or restraint of trade, our American republic were to go back to the English corn-laws, hated by all but the Tory landowner.

But the plain farmer does not understand this; not even (or they do not admit it) our politicians. Both Smith and Hoover were (November, 1928) flirting with impossibilities, of which the McNary-Haugen bill was but one example. Still less does the farmer realize that he alone, of our wealth-producing class, is up against a world-proposition. He alone must compete, on almost equal terms (for his labor-saving machinery helps him a little) with the ryot of India, the fellah of Egypt, the gaucho of Argentina, the coolie of Japan, soon perhaps the moujik of Russia. This was not so for our first century, when he got his land for nothing. Transportation, too, then cost him relatively little. The whole Mississippi valley was settled and built up on the theory that the farmer could send his wheat to the seaside for something like three mills per ton per mile. Therefore New England grain-farms went out of existence. But now it costs thrice as much, and his land has to be bought. There is no "problem," but a condition; or if there be a problem, it is subjective. He must face unescapable facts and seek rather to raise his own skill than to make new laws. He must use his mind to more intelligent agriculture, raise more wheat than the present poor thirteen bushels to the acre, and at the same time, unitedly,



see to it that the cruder world-crops like wheat be not produced in excess of our home consumption; diversify his farming, rotate his crops, learn more things to grow. Above all, subjectively, improve himself—his thrift, his providence; use part of his surplus in bumper years to pay off his mortgage rather than buy victrolas—and, if all these things fail, the more educated must turn to more skilled production, to some industry, till the number of agricultural laborers falls to the equivalent of the home demand. This is of course already being done, to the grief of our more short-sighted economists who cry “back to the soil.” There is a true “value,” according to our definition, in country life; socially it is essential; it lies at the basis of national health and character; but there is no economic reason why prairies should be ploughed, forests felled, to forestall a cheaper foreign supply, any more than that oil should be tapped or coal mined in advance of the home needs and at a cost exceeding that of the world’s market. Except, therefore, so far as indicated in the previous sentence, we should drop any sentimentality about the “agricultural interest” and face the cold fact that at bottom the farm laborer, the quarter-section squatter, the Southern negro, is not only unskilled labor, but in unavoidable competition with the unskilled labor of the whole world. And surely capital requires no protection; it is impossible also; no government can guarantee that a farm bought in 1919 at \$200 an acre shall sell for that in 1929. They faced the question squarely in England at the corn laws’ repeal, with a far stronger class prejudice and power in the landowner, and against both the practical Disraeli and the sentimental Ruskin who wished mainly “to keep green the fields of England and red her children’s cheeks”—by far the finer argument of the two. But the landlord and the tenant-farmer both went into improved farming—some thousands of acres went back to grazing or to forest—and no economic advantage was lost.

Perhaps the balance *was* "in black." Yet when the Great War came, the puny physique, the feeble health, the inexperience of outdoor life, of the Lancashire operative,—came out "in red."

. That is why—and not for any economic "hard-luck story"—we may conclude that, for our democracy and for England, later perhaps for Germany (other countries have not reached there yet), our farmers are right, and they must be helped at almost any cost—but mainly, if not entirely, by a greater intelligence not only on the part of government but on their own.

An apology is perhaps due for devoting even these few pages to so much discussed a subject as agricultural relief. Yet it would not seem that even the simple principles laid down here are commonly understood. And the life—as well as the livelihood—of half our people could hardly be omitted from any broad study of the Way of democracy.

When we come to skilled artisan labor, we find at this writing almost no discontent in America. Such as there is—in the textiles, for instance—arises from curious causes, social in their nature, whether permanent or not, and again from the fact that the labor to produce coarse cotton cloth is so nearly unskilled as to meet Asiatic competition. But it is a peculiarity of all American writers, even of most sociologists, that they leave social considerations outside, apparently considering them beneath their notice; such is not so much the case with continental writers; though even de Tocqueville, whose last book declares itself particularly occupied with a study of the effects of social equality and has much to say on those which result from "classes" and "rank," fails entirely to perceive that any such conditions can exist—and even more strongly—in a country without the institution of rank.

Yet our manufacturers realize, when the fashion of one

row of buttons on women's dress made the fortune of several mills—when reducing her costume from fourteen yards of cotton cloth to three yards and that silk, ruined the industry of four States—that they are up against a social question. And the importance of such will become more striking when we consider, economically, the fortune in democracy of our next great class—those who are still in a sense artisans, working with their hands—clerks; as well as of that vast number of our wage or salaried populations, ranked in our national census under the head of "personal service." Their wage is debased far out of proportion to that of skilled "labor,"—and that purely for a social reason: that their work is not called "labor," that they work indoors, or with a white shirt and starched collar. Silly indeed must the distinction appear to a Martian. Yet we are now hardly surprised that the reward of a plumber, carpenter, bricklayer, riveter, is greater by from two to five times than that of the professor, teacher, salesman, stenographer, clerk or clergyman. Yet surely the outdoor life of a painter, for instance, is more agreeable, more sanitary, lighter and less monotonous, than that of a clerk poring over figures. The reason is a mere social convention, and its root in what, for want of a more dignified term, we must call snobbishness.

Dry economists completely overlook this human factor; humanists, men of the world rather than the closet, must regard it in its innumerable forms as almost the most important factor in the equation of democratic equality. It may be even asserted that snobbishness—would that there were a more serious name for it, it makes our whole argument appear trivial—existed less in the earlier aristocracies where everybody's rank was definitely marked out, than in our American democracy. Then a man's place was fixed from father to son; he hardly thought of leaving it; but it is probably the desire of every American to rise in fortune, of every

woman to rise in "social position," that imparts that look of discontent which all foreign observers see as peculiar to us, not to be found in the continental peasant, or laborer, or tradesman. True, the French are a nation of snobs—one would deem it, from Marcel Proust, their only motive—the English in some ways more so than we, but only in that limited class which touches upon that realm which grandiloquently entitles itself "society"; a comparatively negligible, except in foreign affairs, factor of the national life.

Let any one who regards this most widely spread of all our ambitions stop and think. It exists even most strongly in what we used to call the middle classes. In any country village or small town—and it is this that is the microcosm of our national life—the line of demarcation is far more rigid between the bank-clerk's wife and the plumber's than any existing between parson, judge, lawyer or business man. Then take the case of "address." Any Englishman will tell you that such and such a neighborhood is a "good address," and he does not only mean by this that it is not in the slums; he probably means that an earl's mansion is round the corner. And any American "realtor" (this very word was coined by a sort of snobbery) will tell you that a house on B street, better situated for view, just as convenient for schools or theatres, just as well or better built, will only sell for half what a house on A street, just one block away, will sell for, because the latter street is "fashionable."

It is a silly subject, and one hastens to leave it; yet one must recognize it as, after the mere bread-winning, the most potent motivation of American family life. Schools are chosen for it, neighborhoods sought, homes changed, liveli-hoods selected, almost, sometimes, religions. And this is why our vast clerical, educational, "personal service" class (they have not as yet, and usually cannot have, trade unions) are paid far less than the skilled laborer; and it is the reason why

domestic servants, for precisely like considerations, are paid double or treble their economic value.

Lawyers! Rather than adopt an honest trade, thousands of half-educated youths; many of the cleverest, Jews; crowd our examinations for the bar, far in excess of any legitimate demand, to be able to pawn the dirty linen of their souls for fees aggregating far less, for nine-tenths of them, than a mechanic's wage—unless they become "shysters," a term too well known to need definition.

It must be the way of democracy to rid itself of "snobbery"—the following of false social ideals, disregarding true values, "meanly admiring mean things." It must concern itself with true social values. The subject is far from a trivial one. It involves learning to spend a fortune wisely when acquired, as well as the equalization of reward to the real value of work—probably with advanced compensation for those drafted to mines, stokerries, or the more disagreeable labor—and hopefully none at all for the shyster, the raker-off, the drone, or what, in China, they call "the squeeze." It involves seeking out socially—not those who have a little more money than the fortune you have just acquired or who have best learned the tricks of unproductive amusements—but those who, by character or attainment, will do most good to you or your children. It involves not worrying about inequality of material possession—such a condition is necessary to any diversified civilization, socialized equality would be stagnation—but the enjoyment of the equality of opportunity for material advancement, and ever caring more for what you are than for what you have.

One may sink at the end to a commonplace; but thank God that it is one! And one fears it may yet be many years before our democracy worships this inequality rather than the other.

## CHAPTER XIX

### AMERICA'S ACCOMPLISHMENT

American democracy has much to teach the world,—and some things not to forget. Modern democracies, new-made in Europe, in general must steer between the Scylla of a Mussolini and the Charybdis of a Bolshevist serfdom. But as ancient democracies perished from foreign aggression or corruption, we Americans no longer fearing the former, must keep pure from the latter. And never was it so true that, from the danger of tyranny by uneducated majorities ignorant of the past, eternal vigilance is the price of liberty.

We may resolve the lessons of our whole study under three great heads—liberty, life, light. Anglo-Saxon democracy most fully attained the first, though the French Revolution formulated its abstractions; our American experiment is now showing the possibility of full life, for all; but for what we call Light, we have still to learn from continental civilizations. Equality—of condition—is, as it were, a by-product, not an abstract principle, except as applied to equality under government. Yet, put second in the French “slogan,” they and de Tocqueville the prophet too often mistook the attribute for the essence.

The great lesson our own democracy is teaching an amazed world, is the possibility, economically speaking, of everybody's enjoying a wide and full life in large part free of the primal curse of labor. “The sweat of his brow” remains probably no more than is good for us. But France, Germany, Italy can still show our masses how best to use their leisure. England can teach us character and conduct. And the Orient more than ever contributes to our thought and art.

But to that very fulness of life we Americans have made

possible, liberty—whether of action, trade, thought, speech—one was almost about to say, conduct of life—is more than ever essential. Most things have their uses. The taboo of one generation is forgotten in the next. Our ancestors thought dancing sinful; we think drinking is. It is a question whether any sin—as distinct from crime,—which is an offense against the State or one's neighbor—should be disciplined by government. Without liberty of action, virtue disappears; we do not build up character.

No; our American contribution to the world's progress is so far only economic, not ethical, spiritual or æsthetic—saving only one great quality, our gift of good will to men. Having given the multitude the possibility of a full life, we must still look to the Old World to see what that full life is. But we have brought hope to the older world. Just as we hope to show that the cosmic object, even only so far as we can divine it, is life, not death; light, not darkness; consciousness, joy, rather than lifeless matter or suffering—so we have justified man's earthly needs (hopefully ever higher), encouraged him to want things, even though they now be but material, even amusements or toys. The more men want things, the more there will be things to do—even the intelligent Bolsheviks see this, and the pessimism of Karl Marx will be as forgotten as is the metaphysic of that other German, Hartmann, who taught that unconsciousness, inorganic existence almost, was the normal condition of the universe, and consciousness, human intelligence, a regrettable disease.

We Americans are still jostling one another for the barest materialities, in danger perhaps of losing, or never attaining, the joy of life—no mere *joie de vivre* (though that indeed is a true *value*), but Joy, in the largest sense—hard to define, to some people hard to defend, as having no immediate, apparent, ethical value (I say *apparent*, because one is not so sure). I have a Puritan friend to whom a cathedral,

a stained-glass window, is revolting; to many people music is but a noise. This art is perhaps the readiest example; to many it is joy—pure joy, without meaning or ethical result. I suppose no one goes away from the Fifth Symphony, even, a braver or more moral man. Yet, somehow or other, we know that that joy is right—and somehow, we feel sure, joy as an end is right. It was of light—and joy—that Dante made paradise, and the stars in music sang together. But let us not anticipate——

Democracy has yet done little of what it is here to do. Liberty? Well, political liberty was won rather by the barons than the people; the plebs, as we have surely shown in our first part, care little for it. Equality? Yes, between the sexes. Not of possession, social position or chance in life. Perhaps in the first two it is not desirable; in the last, impossible. The educated man of family, with relations and social affiliations, has still the call—only the exceptional business genius passes him. Otherwise how do families in a democracy endure? For we see that they do. Perhaps it is right that they should; Charles William Eliot in his *American Contributions to Civilization* defended this, and pointed with satisfaction to the permanence of American family stocks; and it is more remarkable with us, as existing without hereditary places or titles and a very general testamentary distribution of property. With any system of private property, material equality is impossible; and under socialism, as we have shown, the inequality would be worse morally, and more hopeless to the common man. The power of the present millionaire is as nothing to what would be that of the boss under socialism—compare an Astor with a Lenin! No; America's aim should be not to promote equality, but universal competence (and competence in both meanings, by education as well as by possession), and with competence to achieve, competence to enjoy. She must prove that human character, fundamentally



good—as children show, for we are no believer in original sin—the pressure of worldly anxiety removed, may turn to the love of one's neighbor, whether one be professedly Christian or impatient of any creed, as the obvious and most joy-giving occupation of man. To this conclusion has even Clemenceau come. Angrily rejecting Christianity, the great war-leader of France has found time to chronicle his "evening thoughts" in two great tomes of physics—he supposes it *metaphysics*—and he comes back just to this.

America has not given the world paradise, but the hope of paradise; not the millennium, but the possibility of one. We have stretched the canvas, but the picture must be painted by an older world. Granted, we have been materialistic; we have had to be; but on our matter may rest the spirit, our superficial materialism make idealism practicable. We need more of the arts of peace. Ferrero is probably right in thinking that just now we need more of the Latin spirit in our souls, more of the English four-squareness, more of the Oriental calm; of the French joy-in-life, of the German dream-in-life. But one lesson we have taught the older world—kindliness. They do not realize it; we can hardly expect them to; for they do not understand us. Our manners are often repellent, our self-assurance crude. But it is *American-ly* true; the spirit, a new one to be national, is found in South America, in Canada, as well. The Western Way is one of good will; and, to all peoples, peace. Even that first world-wide effort, the League of Nations, was an American foundling, only disowned by a fraction of our Senate because our Western people feared that it led to war.

There is one danger one foresees in our economic situation; an old one in a new form: the old agrarian abuse reappearing in our distribution of other wealth. It arises from the extraordinary invention of the Corporation. When a master of labor dies, however swollen the wealth of the mill-

owner or ironmaster, the ability, the power that made it, dies with him, and his accumulations are distributed. But the Corporation is immortal. Moreover it grows. It becomes what we call a "trust." It may—does—grow to control an entire industry, the whole national production of oil, or tinware, shoe-machinery, or aluminum. That is the common objection, and this is well understood. But there is another danger resulting from the Corporation, whose consequences have never been pointed out. In the armor of that device a business baron of to-day may clothe and endow his family with a perpetual wealth and privilege compared with which that of the feudal land-baron were a trifling and insecure advantage in life. Our trusts now bid fair to be not only universal but permanent. Their management has become excellent, their policy humane; they evoke but little hostility. Even monopoly, under the general State, or Federal, control of corporations and regulation of their charges, is no longer actively objected to. We have arrived at a point where every industry, productive, manufacturing or even distributive, is in the hands of one, or at most two or three, giant trusts. And, except in the unlikely case of continued bad management, there is little likelihood of their being displaced or replaced. But this gives opportunity for the permanent intrenchment of the great investor to-day, under the clause of the Constitution forbidding the impairment of contracts, in an eternal first lien on the profits of labor. Take the case of a man buying preferred shares or bonds running a hundred years in some great industrial. His six per cent preferred stock can *never* be deprived of its tribute—so long as the industry lasts; nor his interest on the bonds during their lifetime. Thus Carnegie, when he took his half billion bonds on the United States Steel Company, had an almost feudal claim on all the profits of all the laborers therein far more effective, and with less counter duties in the landlord, than

a feudal baron had for his rents. True, the heir might sell or waste his stock—but that was equally true of the baron's land—unless he does, the tribute goes on forever; a privileged class is being created. It is possible to-day for a capitalist to buy the preferred stocks of nearly all our great industries, which will entitle him and his heirs perpetually to a prior lien on the profits which, under the provision of the Constitution, can never be reduced while the corporation remains solvent.

I accentuate this point because (the German socialists having no such corporation complexity or constitutional protection of contract rights) even Marx does not point out the economic-social consequences of the possibility. But lest the anti-capitalists take it up—(and indeed a whole book might be written about this social development; it is purely a consequence of the invention of the share corporation with perpetual charter; and this was an almost accidental development out of the ancient Guild: the world might have got on without it; though indeed President Eliot of Harvard selected it as one of the definite American contributions to civilization, meaning of course by this that modern kind of corporation which limits any liability of shareholders; this was indeed invented by the State of Connecticut, somewhere about 1840)—let us hasten to point out one basic difference. The feudal baron got his rents whether the tenant-farmer had anything left or not. But the holder of shares in an incorporated industry does not get his dividend until after all labor has been paid. That difference is world-wide.

Moreover, taxation will save us. Here we come back to Shaw and the "Fabian" approach. Socialism may be constitutionally tried by taking ever-increasing proportions of swollen incomes under a graded tax—for ever-increasing human needs! In another chapter, we have shown how already we are doing this.

Because I have strongly defended the principle of human liberty, and even, within closely guarded limits, the institution of private ownership, the thoughtless radical may be too ready to class me as a conservative. I am the more glad to point out a field in which his energies may be wisely employed. Not from mechanical progress, preponderating machinery, many inventions, comes the oppression of the poor, or gross inequality in wealth—but from artificial creations, immortal and “soul-less” corporations, man-made; and above all, from unintelligence, misdirected effort, intentional idleness, envy and waste. Division of all existing capital would make but a small dividend to each of us, and would stop the possibility of making more; but the intelligence to stop waste, to appreciate more values, to encourage, not oppose a man, in doing his best work, and to produce, after the material necessities, more things worth while,—might increase the dividend of such things indefinitely.

## CHAPTER XX

### THE WORLD-AIM

No one who stands by the rocks of a Northern sea in earliest Spring can have any doubt of the will to life. Give the impulse what source you will,—Divine—or only Clemenceau's "process of events"—this world's will to live is broadcasted, in the countless trillions of larvæ of barnacles and other marine life which, with the rapidly dividing protozoa, make up the plankton—the milky veils of fish-spawn coming to life almost as the ice melts—the flowers by the glacier on the land—at sea, the plankton of both plant and animal life which sweep the waters at the first warm breath that makes life possible.

And, one other great step farther, nature's trend to *conscious* life. Clemenceau sneers at this; or hints that, as trees have a pulse and temperature, inorganic life, rocks or metals, may be conscious too! Hartmann regards consciousness as a horrible disease, a sort of cancer-fungus, only developed by humanity and to be got rid of by world-suicide. Yet surely the lesson of evolution points toward it. Nor will the Fundamentalists deny that the "enchainment of events" is toward consciousness, conscious beings,—he, though, will place God behind it. But Clemenceau, because *he* can see no motive for a God creating us, denies the creation. And Don Quixote, a greater gentleman than Clemenceau, saw "how Adam wishing to be as God, knowing good from evil, ate of the tree of knowledge, and his eyes were opened, and he saw that he was made to labor and to *progress* . . . for humanity; but to love—not humanity—but one's neighbor as one's self."\*—Let us take a step farther.

Is not the next thing, after life, liberty—free will? Our

\*Unamuno, *Vida de Don Quijote y Sancho* (Madrid, 1928), pp. 52, 54.

most narrow-minded forebears surely thought so, although Jonathan Edwards, as Clemenceau would gibe, thought it only a liberty to be damned! Yet somehow we all believe it. And the aim, the hope, of conscious free will in building character is—to make a living conscious being, endowed with liberty, to act as true in nature as the first-met inanimate metal or element.

This thought has never been properly developed. The nearest to it (of course he was neither metaphysician nor scientist, but a poet) was de Vigny, in his "I am Emerald." And it leads at once to another vision—of the marvellous *truth* with which what we call nature confronts us. I am Emerald—I am Iron—I am Hydrogen. I am always true to myself. Great ships are built—only five-eighths of an inch of iron plate or three-eighths of steel plate, thick; yet that keeps out the ocean. If any one of those thousands of iron plates failed to be exactly true to itself in strength, the lives of all on board would be lost in a few moments. And steel—because man-made—is not quite so surely true to itself as iron. But nature must be true, even to cruelty: a certain weight of a chemical, exploded in a cannon, will carry its death-dealing shell every time so that it falls on the spot aimed at. Electricity always responds; the magnet always draws. Gold will not rust, nor iron fail. Man feels himself, and rightly, at the summit of the sensible world; metals, inorganic bodies, unconscious vegetation, even conscious animals, all below him. Yet how many men do we develop as true as iron? (Steel is the common saying; but steel, man-handled, has something of man's imperfection in it.) And when we come up the scale to life, we may not be too proud. Few human beings are as faithful as a dog. Is not the highest moral aim free will can be used for, to become so? Only "behaviorists" say no. Why is it not even finer for a conscious being to be true to himself, than for a metal?

"What is truth?" asked Pilate. The cosmos is; what Cle-

menceau calls the process of events is ; not only all our vaunted science but our whole life is based on nature's being true. But it is different, not what we think it, or see, or feel, or smell. True, it is two centuries since Bishop Berkeley remarked that the world was all in the mind of the observer, in itself without color, shape, tone or beauty. Pausing only to suggest that what Berkeley sees may be the more real, more divinely intended of the two—modern science goes farther, to repose on a universe of imponderate points of energy in motion, each electron a whirling dervish in itself. Is this the final truth? Is this more ultimate than what we see or feel? "Relativity" works both ways.

"At the radium mines of Joachim's Thal," Clemenceau argues, "your guide will have his key photographed under the invisible raying of the metal in disintegration in the bosom of the earth." But how is it that a color photograph will reproduce, not whirling atoms, but their human picture, with form and color as we see it? Nature tells always the truth; and "nature" (as we say, lacking a better word) seems to see the thing as we do—"Il est donc reconnu pour constant," says Clemenceau,\* "que sur toutes surfaces impressionables, c'est-à dire sensibles à quelque degré, des torrents d'images s'écoulent comme ces flambées d'étincelles que le soleil allume sur la mer . . . la photographie ne fait qu'en révéler le tableau préalablement inscrit sur la paroi nerveuse par les vibrations d'ondes. . . ." True; but this "nervous surface" sees the things as we do. Which is God's truth: the succession of air vibrations altering in rapidity, or *Adeste Fideles* as we hear it?

Consciousness he regards as a fortuitous accident, not a world-aim or "final cause." "Whencesoever it comes, or whithersoever it goes, the world holds us and is carrying us away into developments whose infinite consequence escapes all inductions of our experience. We, the passengers of a day,

\**Au Soir de la Pensée*, I, p. 200.

have rescued from the unconscious domination of matter some possibilities of knowledge and action which assure to us the advantage of an infinitesimal collaboration with the planetary '*œuvre*,' where unconsciousness and consciousness have come '*provisoirement*' to meet."—How does he know it is "*provisoirement*"?\*

*Light* we have named as the next aim of democracy, after life and liberty in their fullest sense. Conscious intelligence; ever learning more things. Indeed even the grim French statesman—oddly agreeing with Don Quixote quoted above—admits this as almost the only end justifying our pride in being. "Connaître! Tenir le fil du labyrinthe! Se sentir en pleine communion d'activités avec les mouvements des choses! A chaque stage de la connaissance, tressaillir d'une compréhension fragmentaire . . . saisir la lente évolution de l'homme dans la voie d'une conscience supérieure."† True, he calls it "l'éclair de cette explosion de personnalité dont nous faisons tant de tapage." But, atheist, he admits it as the sole aim of man's life. "La bête n'a pas même de 'faux dieux,' en compagnie de qui s'égarer." (*Ib.*, p. 269) "It is the fusion of thought with the dream that leads us to the approach of the perhaps inaccessible. The knowledge of relations permits us to move some of them ourselves, in pursuit of a determined end. Thus we act upon the Cosmos as well as ourselves. Where then the pretext of that Asian renunciation which has too long held Asia back from her destinies?" (*Ib.*, p. 103.) "*And if the day has come when man has lost his God*, it has come for him to seek within himself and finding himself to enter a way of evolution beyond his primitive heredities. Disembarrassed of its myths, Idealism more than ever calls for the highest proof of our faculties." (*Ib.*, p. 103.) So even the hard-bitten atheist's statement proves our point. Light—conscious intelligence, in liv-

\**Ibid.*, p. 339.

†*Ibid.*, p. 264.



ing beings possessed of will—is a cosmic aim—not a cosmic accident. This we may as safely hazard as any scientific hypothesis.

There remains what to some temperaments will be the most difficult to admit—that which for want of a better term we have called Joy. But, on the one hand, if God exists—or, on the other, there be “an enchainment of events” leading up (even evolutionists admit the *up*) to conscious, living, willing beings,—why may it not be, in the one case divine handiwork, in the other a natural attribute of the “will to live” which even materialists admit? “God Himself,” sneered the atheist, “would be naught without the creation.” So the taunt becomes explanatory of the divine purpose. Or, if we are materialists, what more natural aim for the “process of events” to propose for itself?

“Joy” in no narrow sense. Not even limited to the “*joie de vivre*.” Beauty. Beauty of the world, of man’s work, of the character; first of all, the mind, and the heart, to enjoy. Clemenceau admitted the joy of taking part with intelligence in the cosmic process. Greater is the joy of trying to take part in the divine purpose.—But there you assume the Divine, it is objected.—Forgive me. But we may at least say the joy of work good or lovely to the world, the joy of uplifting oneself or others? of the higher life? We need not deny the phrase, every one knows—“enough for all practical purposes,” as Stuart Mill would say—what it is. And Joy, ceasing to be selfish, becomes a higher thing.\*

\*“To attain to joy, therefore, which is an inward rapture, we accept as intimately ours the world of sense. For the joyful spirit, matter is no illusion. An essential ingredient of the life which is highest because it is most abundant, matter is actually the wing of the mind. . . .

“The origin of matter, as great a mystery as the origin of evil, cannot but be noble. Since it is existent it, too, is stamped with the magnificence of Being. Its ancient chaos is the portal of infinity. Believe at the outset that life is joy: only let joy be read spiritually; in other words, not as a thing to claim but as a thing to share in.” (The London *Times* Literary Supplement for Dec. 27, 1928, quoting Wordsworth and Santayana.)

We have tried to show how democracy started for Liberty; then how our American democracy, taking its eye from that first goal, aimed at Life, that is to say, the possibility of material ease, leisure for education, for art, music, knowledge, pleasure, æsthetics, adventure, research and tranquil thinking, for every one; its great object lesson that this can be done; its inadequacy on one side, which Europe, the humanities in education, the Latin genius and the lessons of the past can best teach us; the prime necessity of our learning what are real values, what makes in the long run for life and growth, not death and waste, learning what joys are lasting, what pleasures justifiable, upbuilding also the character of the individual, of the nation, renouncing war for the nation and for him—good will to the world.

How Light is next—education, understanding, charity—how in the first we are at fault; the world does not progress by the minds or insight of the average, but by the vision from the summit.

How, finally, Light and Joy lead to—the word, uncomprehended by Shakespeare and by Goethe, but that Dante and Cervantes saw was all,—and Another; possibly the whirling dervishes of the electrons know it; a stone, flying by the force of gravity and self-conscious, would think it flew of its own will; so perhaps the world may move by and for it—the word which *“muove il sole e l'altre stelle”*—

Democracy is now the most hopeful teacher of this word.



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